No. 88-1134

Supreme Court, U.S.
FILED
JAN 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1988

LESTER W. SMITH and WESTERN RESERVE GROUP, INC.,
Petitioners,

vs.

COMBUSTION ENGINEERING, INC., C-E CAST EQUIPMENT, JAMES F. CALVERT, GEORGE E. FISHER, JR., LAWRENCE K. HUBBELL, EDWIN M. KAVANAGH, JAMES B. KELLY, JAMES E. KLIMA, THOMAS E. McGRANAHAN, WILLIAM FRANCIS ROCHE, ARTHUR F. SANTRY, JR., and FG DOE, EN ROE and JB LOE,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit

MACK D. COOK, II, *Counsel of Record*
COOK & COOK
900 First National Tower
Akron, Ohio 44308
Telephone (216) 376-1005

Attorney for Petitioners
Lester W. Smith and
Western Reserve Group, Inc.

REBECCA H. COOK,
Of counsel

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

47pp

I.

QUESTIONS PRESENTED FOR REVIEW

1. When an established firm, without patents, trademarks, copyrights or bona fide trade secrets to support a civil action in federal or state court, with assistance of present employees and in conspiracy with others, chooses to deal with relevant market competition using state law criminal search warrant processes and state trade secret felony theft law against a fledgling firm founded by a former employee:[1] is an unlawful search and seizure by a present employee and outsiders shielded from federal and state civil rights law review by a one-year time bar; and, is conspiratorial anticompetitive and monopolistic conduct shielded from federal antitrust law review by the *Noerr-Pennington* doctrine?

2. Which common law tort—"abuse of process" or "malicious prosecution"[2] shall be used for a federal court case where a former employee alleges many material facts as to multifaceted conspiracies creating Sherman Act violations by an established firm, and the facts include a prior prosecution of the former employee in state court under state trade secret felony theft law, and the defense summarily pleaded for the established firm against the antitrust claims is an immunity from suit derived from the *Noerr-Pennington* doctrine because "the defendants resorted to the courts."?[3]

3. Would the answer by the Court to Question 2 be any different: (a) if the prior prosecution of the former employee in state court on a felony charge never went to

---

[1] The comparative terms "established firm," "fledgling firm," and "former employee" are credited to the authority *Antitrust Remedies For A Former Employee Sued For Trade Secret Misappropriation*," Pet. App. A145 at 151.

[2] Petitioners cite authority for common law definition of the tort of abuse of process in the appendix herefor: Pet. App. A141-142.

[3] Decision, Court of Appeals, filed August 24, 1988: Pet. App. A7.

trial; (b) if the prior prosecution after two years pendency obtained a guilty plea from the former employee to a misdemeanor charge of receiving stolen property having a value less than $150.00; (c) if plea bargain arrangements underlying the guilty plea provided for substantial payment as restitution to the established firm as well as parole under state court supervision but with no time in the county jail; (d) if the payment as restitution was traded for a covenant from the former employee not to compete for an additional three years; and, (e) if the record of conviction of the former employee because of the guilty plea was expunged by the state court after filing of the federal court case?

LIST OF PARTIES

There are no parties not named in the caption.

RULE 28.1 STATEMENT

Western Reserve Group, Inc. is identified in the Complaint ¶4a: Pet. App. A110. Petitioner Western Reserve Group, Inc. is no longer doing business as an Ohio Corporation.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW I

LIST OF PARTIES..... II

RULE 28.1 STATEMENT..... II

TABLE OF AUTHORITIES..... XI

REFERENCE TO THE OPINIONS IN THE COURTS BELOW..... 1

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED 4

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED FOR PETITIONERS' CASE 4

STATEMENT OF THE CASE..... 7

BASIS OF JURISDICTION IN THE U.S. DISTRICT COURT..... 12

ARGUMENT OF REASONS FOR ALLOWANCE OF THE WRIT 13

The Affirmed Dismissal Of The First Count, Which Included A Distinct Claim Based Upon Section 1983, On The Basis Of The One-Year Time Bar Created For All Cases Filed In Ohio Federal District Courts By Automatic Retroactive Application Of A Circuit Precedent Created By *Mulligan v. Hazard,* Was Wrong 14

A Statute Of Limitations For A Section 1983 Case Awaiting Published Decision By The Court..... 17

IV.

The Failure Of The Courts Below To Deny Or Limit An Extension Of The Noerr-Pennington Doctrine Is Wrong In Light Of Two Recent Decisions By The Court 17

The Courts Below Were Wrong In Refusing To See That The Tort Of "Abuse Of Process", Not "Malicious Prosecution", Was The Appropriate Objective Test For Evaluating Respondents' Conduct In Resorting To State Court Prosecution Until Petitioners Pled Guilty 18

The Courts Below Were Wrong In Thinking That Any Degree Of Success On The Merits Of A State Court Prosecution For Felony Theft Of Trade Secrets Has Preclusive Effect Warranting Application Of The Noerr-Pennington Doctrine... 20

The Courts Below Were Wrong In Not Expecting Or Requiring Testimonial Or Affidavit Evidence From Respondents Or Their Attorneys That Any Or All Of Them Were Acting In "Good Faith" When Seeking Out The Participation Of A State Prosecutor Or The Prosecutor's Office For Further Actions Of Anticompetitive Conduct Creating Monopoly Power 21

The Court Of Appeals Below Was Wrong To Not Acknowledge The First Circuit Opinion In *CVD, Inc. v. Raytheon Co.* Which Set Forth An Antitrust Policy Dealing With Assertions Of Trade Secret Claims Against Competitors 22

Both Courts Below Were Wrongly Influenced To Think That Antitrust Law Defendants With The Good Reputation And Business Stature Of Combustion Engineering, Inc., Would Never Indulge In Predatory Litigation In The Context Of Baseless Trade Secret Claims 23

The Court Of Appeals Was Not Correct In Its Citation And Application Of *United Airlines v. Evans*, 431 U.S. 553 (1977) 25

Argument As To Subsidiary Questions Arising From The Third Appeal Taken By Petitioners To The Court Of Appeals 26

The Courts Below May Have Been Influenced Or Biased In Favor Of Respondents By An "Antitrust Policy To Take Account Only Of Efficiency Concerns" 27

The Writings Of Scholar Authors Attest To Public Importance Of Questions Presented By This Case 28

CONCLUSION 30

APPENDIX (Printed under separate cover):

Decision by a Panel of the Sixth Circuit Court of Appeals, Appeals Nos. 87-3378 and 87-3657, Affirming the Judgment of the District Court (August 24, 1988) A1

District Court Order Limiting Discovery by Petitioners (January 3, 1986) A9

District Court Memorandum Opinion (February 19, 1986) A11

District Court Judgment Entry (February 19, 1986) A22

District Court Order (July 29, 1986) A23

District Court Memorandum Opinion (January 21, 1987) A26

District Court Judgment Entry (January 21, 1987) A31

District Court Memorandum Opinion (March 24, 1987) A32

District Court Judgment Entry (March 24, 1987) . A34

District Court Order (March 24, 1987) A35

District Court Order (March 24, 1987) A38

District Court Memorandum Opinion (June 10, 1987) A39

District Court Judgment Entry (June 10, 1987) ... A42

District Court Order (July 24, 1987) A43

Order of the Court of Appeals for the Sixth Circuit Denying Petition for Rehearing (October 12, 1988) A46

Order of the Court of Appeals for the Sixth Circuit Consolidating Appeals Nos. 87-3378, 87-3657 and 87-3761 (November 9, 1987) A48

Order of the Court of Appeals for the Sixth Circuit Dismissing Appeal No. 87-3761 (April 11, 1988) A49

Calendar Coordinator, Court of Appeals for the Sixth Circuit, Letter Dated May 26, 1988, Setting Oral Argument for Appeals Nos. 87-3378 and 87-3657 with Leave to File Update Citations A53

Order of the Court of Appeals for the Sixth Circuit Denying Request for Additional Time for Oral Argument of Appeals Nos. 87-3378 and 87-3657 (June 9, 1988) A55

Order of the Court of Appeals for the Sixth Circuit (July 27, 1988) A56

Petitioners' Statement of Issues Presented for Review, Court of Appeals for the Sixth Circuit, Appeal No. 87-3378 ..... A57

Petitioners' Statement of Issues Presented for Review, Court of Appeals for the Sixth Circuit, Appeal No. 87-3657 ..... A58

State Court Judgment of Expungement (May 18, 1987) A59

Petitioners' Submission to the Court of Appeals for the Sixth Circuit for Reconsideration and Rehearing *En Banc* of Appeals Nos. 87-3378 and 87-3657 ..... A62

Petitioners' Statement of Issues Presented for Review, Court of Appeals for the Sixth Circuit, Appeal No. 87-3761 ..... A79

Letter for Petitioners, Dated July 1, 1988, List of Citations Updating the Briefs of Appellants for Appeals Nos. 87-3378 and 87-3657 ..... A80

Petitioners' Letter Dated March 1, 1987 to District Court Citing Westmac, Inc. v. Smith, 797 F.2d 313 (6th Cir. 1986) and Grip-Pac, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466 (7th Cir. 1982) A102

Letter on Behalf of Respondents Combustion Engineering Dated March 12, 1987, Responding to Petitioners' Letter of March 1, 1987, and Defining a Conflict Between the Sixth and Seventh Circuit on Immunity Under the Noerr-Pennington Doctrine A105

Petitioners' Complaint Filed November 18, 1985 in District Court A108

Petitioners' Amended Complaint Filed July 22, 1985 ..... A130

15 U.S.C. §22 ..... A133

28 U.S.C. §1331 ..... A133

28 U.S.C. §1332 ..... A133

28 U.S.C. §1343 ..... A134

15 U.S.C. §15b A134

Ohio Rev. Code §2305.09 ..... A135

U.S. Constitution, Amendment 4 ..... A135

Ohio Constitution, Article 1, §1 ..... A136

Ohio Constitution, Article 1, §14 ..... A136

42 U.S.C. §1983 ..... A136

42 U.S.C. §1988 ..... A137

Ohio Rev. Code §4749.01 ..... A138

Prosser, The Law of Torts, Fourth Edition, West Publishing Co. (1971), Chapter 3, 13, p. 63 (Trespass to Land) A139

Prosser, The Law of Torts, Fourth Edition, West Publishing Co. (1971), Chapter 3, 14, p. 76 (Trespass to Chattels) A139

Prosser, The Law of Torts, Fourth Edition, West Publishing Co. (1971), Chapter 3, 15, pp. 79, 80, 83 and 87 (Conversion) A140

Prosser, the Law of Torts, Fourth Edition, West Publishing Co. (1971) Chapter 22, 121, pp. 121-122 (Abuse of Process) A141

Title 15 U.S.C. §1 ..... A142

Title 15, U.S.C. §2 ..... A142

Federal Rules of Civil Procedure 9(b) A143

Ohio Rev. Code §2939.18 ..... A143

Ohio Rev. Code §2939.10 ..... A143

Ohio Rev. Code §2939.20 ..... A144

Antitrust Remedies for a Former Employee Sued for Trade Secret Misappropriation, ABA, Section of Litigation, unpublished paper 531-0023/4T, © 1988. ..... A145

Affidavit of Lester W. Smith (January 28, 1986) A156

Affidavit of Lester W. Smith (December 10, 1986) A158

Letter, Edward Niam to James B. Kelly, January 27, 1984 ..... A162

Letter, Edward Niam to William F. Roche, February 3, 1984 ..... A164

Letter, Edward Niam to Peter Phipps, January 30, 1984 ..... A166

Letter, Edward Niam to Tom Beres, February 1, 1984 ..... A167

Letter, Edward Niam to Richard Lobo, February 1, 1984 ..... A168

Letter, Edward Niam to Assistant Prosecutor Gasper, January 30, 1984 ..... A170

Letter, Edwin M. Kavanagh to Edward Niam, January 16, 1984 ..... A171

Letter, Edward Niam to Edwin Kavanagh, February 1, 1984 ..... A172

Letter, Lawrence K. Hubbell to Donald L. Southam, January 29, 1986 ..... A174

Note (Exhibit 12) A176

TABLE OF AUTHORITIES

Cases

Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. _____, 108 S.Ct. 1931, 100 L.Ed.2d 497 18,19,30

Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, 690 F.2d 1240 (CA9 1982), *cert. denied* 459 U.S. 1227 (1983) 19,29

CVD, Inc. v. Raytheon Co., 769 F.2d 842 (CA1 1985), *cert. denied* 475 U.S. 1016 (1986) 22,23

Duncan v. Peck, 844 F.2d 1261 (CA6 1988) 22

Gaff v. Federal Deposit Ins. Corp., et al., 828 F.2d 1145 (CA6 1987)..... 15

Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466 (CA7 1982), *cert. denied* 461 U.S. 958 (1983)..... 19,20

In re Burlington Northern, Inc., 822 F.2d 518 (CA5 1987), *cert. denied* as *Union Pacific Railroad Co. v. Energy Transportation System, Inc.*, _____ U.S. _____, 108 S.Ct. 701, 98 L.Ed.2d 652 (1988) 20,21

Indian Head, Inc. v. Allied Tube & Conduit Corp., 817 F.2d 938 (CA2 1987)..... 18

Mulligan v. Hazard, 777 F.2d 340 (CA6 1985), *cert. denied* 476 U.S. 1174 (1986), *reh. denied* 478 U.S. 1031 (1986)..... 4,14,15,16

Okure v. Owens, 816 F.2d 45 (CA2 1987) 17

Owens v. Okure, No. 87-56, *cert. granted* March 22, 1988, argued November 1, 1988 (57 U.S.L.W. 3359) 17

Patrick v. Burget, 486 U.S. _____, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988) 17,18,19

Potters Medical Center v. City Hospital Ass'n, 800 F.2d 568 (CA6 1986) 18,19,20,29

Raytheon Co. v. CVD, Inc., 769 F.2d 842 (CA1 1985), *cert. denied* 475 U.S. 1016 (1986) 22,23

Scheuer v. Rhodes, 416 U.S. 232 (1974) 8

Sessions Tank Liners, Inc. v. Joor Manufacturing, Inc., et al., 827 F.2d 458 (CA9 1987) 29

Thomas v. Shipka (II), 829 F.2d 570 (CA6 1987) 16

United Airlines v. Evans, 431 U.S. 553 (1977) 25

Vodila v. Clelland, _____ U.S. _____, 107 S.Ct. 3255, 97 L.Ed.2d 754 (1987) 15,16

Vodila v. Clelland (II), 836 F.2d 231 (CA6 1987) 16

Westmac, Inc. v. Smith, 797 F.2d 313 (CA6 1986), *cert. denied* 107 S.Ct. 885 (1987) 19,20

Wilson v. Garcia, 471 U.S. 261 (1985) 9,15

CONSTITUTIONAL PROVISIONS

Ohio Const., Art. I, §1 Inalienable Rights 4

Ohio Const., Art. I, §14 Search Warrants 4

U.S. Const., Amend. 4 4

U.S. Const., Art. 4, §1 (full faith and credit) 26

STATUTES AND RULES

Fed. R. Civ. P., Rule 9(b) 6

Ohio Rev. Code §2305.09 4,15

Ohio Rev. Code §2939.10 6

Ohio Rev. Code §2939.18 6

Ohio Rev. Code §2939.20 6

Ohio Rev. Code §4749.01 5

Restatement (Second) of Torts §682 (1977) 20

Supreme Court Rule 21.1.(f) 4

15 U.S.C. §1 6

15 U.S.C. §2 6

15 U.S.C. §15b 4

15 U.S.C. §22 12

28 U.S.C. §1254(1) 4

28 U.S.C. §§1331, 1332, 1343 12

42 U.S.C. §1983 5,14,16,17

42 U.S.C. §1988 5,14

TEXTS

Bradley, L.D., *Note: Noerr-Pennington Immunity from Antitrust Liability Under Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.: Replacing the Sham Exception with a Constitutional Analysis,* 69 Cornell Law Review 1305 (1984) 19,29

CCH Tr. Reg. Rep. ¶68,224, (9-27-88). 1,24

E. F. Mannino, *Antitrust Remedies for a Former Employee Sued for Trade Secret Misappropriation* ABA/Section of Litigation, 1988 13,23

H. Hovenkamp, *Antitrust Policy After Chicago,* 84 Mich L. Rev. 213 (1985) 27

Meyer, D.L., A Standard for Tailoring Noerr-Pennington Immunity More Closely to the First Amendment Mandate, 95 Yale Law Journal 832 (1986) 28

Note: Smith, E., *Eliminating Predatory Litigation in the Context of Baseless Trade Secret Claims: The Need for a More Aggressive Counter Attack,* Santa Clara L. Rev., Vol. 23, 1095 (1983) 23,24

Prosser, *Handbook of the Law of Torts,* 4th Ed.; West Publishing Co. (1971) 5,20

Restatement (Second) of Torts §682 (1977)..... 20

U.S. News & World Report, Dec. 26, 1988/ Jan. 2, 1989, p. 124..... 13

No. _____

IN THE

Supreme Court of the United States

October Term, 1988

LESTER W. SMITH and WESTERN RESERVE GROUP, INC.,
Petitioners,

vs.

COMBUSTION ENGINEERING, INC., C-E CAST EQUIPMENT, JAMES F. CALVERT, GEORGE E. FISHER, JR., LAWRENCE K. HUBBELL, EDWIN M. KAVANAGH, JAMES B. KELLY, JAMES E. KLIMA, THOMAS E. McGRANAHAN, WILLIAM FRANCIS ROCHE, ARTHUR F. SANTRY, JR., and FG DOE, EN ROE and JB LOE,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit

REFERENCE TO THE OPINIONS IN THE COURTS BELOW

By a decision filed August 24, 1988, issued as mandate, October 26, 1988, the Court of Appeals for the Sixth Circuit concludes: "The judgment of the district court is affirmed." This decision has been stamped by the court clerk "Not Recommended For Full-Text Publication."

None of the opinions in the District Court have been designated for publication.

In accord with Supreme Court rule, the separate appendix herefor contains the decision filed August 24, 1988, Appeals No. 87-3378 and No. 87-3657: Pet. App. A1-8.[4] This decision is informally reported at ¶68,224, *CCH Tr. Reg. Rep.* 9-27-88.

The seriatim pretrial orders, opinions, and judgment entries of the District Court, thirteen (13) writings from January 3, 1986 until July 24, 1987, are in the separate appendix herefor in chronological sequence, first to last. These writings were:

> Order limiting discovery by petitioners pursuant to Fed.R.Civ.P. 26(c), prepared by Cleveland counsel for Combustion Engineering respondents, last sentence handwritten by the District Court, filed January 3, 1986: Pet. App. A9-10.
>
> Memorandum Opinion filed February 19, 1986: Pet. App. A11-21.
>
> Judgment Entry filed February 19, 1986, dismissing civil rights Count I against Combustion Engineering respondents: Pet. App. A22.
>
> Order filed July 29, 1986, denying reconsideration of dismissal of civil rights Count I against Combustion Engineering respondents: Pet. App. A23-25.

[4] The statement of issues presented for review in Appeals No. 87-3378 and No. 87-3657 are in the appendix herefor: Pet. App. A57 and A58.

Memorandum Opinion filed January 21, 1987: Pet. App. A26-30.

Judgment Entry filed January 21, 1987, dismissing antitrust Counts II and III against Combustion Engineering respondents: Pet. App. A31.

Memorandum Opinion filed March 24, 1987: Pet. App. A32-33.

Judgment Entry filed March 24, 1987, dismissing civil rights Count I against respondent Hubbell: Pet. App. A34.

Order filed March 24, 1987, denying reconsideration of dismissal of antitrust Counts II and III against Combustion Engineering respondents: Pet. App. A35-37.

Sua Sponte Order filed March 24, 1987, for dismissal of antitrust Counts II and III against respondent Hubbell: Pet. App. A38.

Memorandum Opinion filed June 10, 1987: Pet. App. A39-41.

Judgment Entry filed June 10, 1987, dismissing antitrust Counts II and III against respondent Hubbell: Pet. App. A42.

Order filed July 24, 1987, requested by the Combustion Engineering respondents, denying relief from judgment as to dismissal of antitrust Counts II and III against respondent Hubbell: Pet. App. A43-45.[5]

The Clerk's Order for the Court of Appeals denying a petition for rehearing and suggestion for rehearing en banc was filed October 12, 1988: Pet. App. A46.[6]

[5] The state court Judgment of Expungement of the conviction of petitioner Smith on the misdemeanor charge of receiving stolen property having a value less than $150.00, referenced in the Order filed July 24, 1987, is dated May 18, 1987: plaintiffs' Exhibit 300, Pet. App. A59-61.

[6] The submission by petitioners to the Court of Appeals prior to October 12, 1988 is in the appendix herefor: Pet. App. A62-77.

For this case, the petitioners had to lodge three appeals with the Court of Appeals: Appeals No. 87-3378, No. 87-3657, and No. 87-3761.[7] The appeals were consolidated by administrative order on motion of respondent Hubbell, who also was granted leave to adopt any brief of the Combustion Engineering respondents for the second Appeal No. 87-*3657*. The Clerk's Order was filed November 9, 1987: Pet. App. A48.

An Order of the Court of Appeals filed April 11, 1988, dismissed Appeal No. 87-3761 "for lack of appellate jurisdiction": Pet. App. A49-52. This order has been stamped by the court clerk "Not Recommended For Full-Text Publication".

The Calendar Coordinator, Court of Appeals, by letter dated May 26, 1988, set the date for oral argument of Appeals No. 87-3378 and No. 87-3657, with leave to file update citations[8]: Pet. App. A53-54.

A Clerk's Order for the Court of Appeals filed June 9, 1988, denied petitioners' request for time beyond fifteen minutes, after respondents' opposition, for oral argument of Appeals No. 87-3378 and No. 87-3657: Pet. App. A55.

Another Clerk's Order for the Court of Appeals was filed July 27, 1988: Pet. App. A56. This Order created uncertainty as to the argument weight of the letter dated July 1, 1988, from petitioners' counsel. See, footnote 8. The opinion from the panel makes mention of only one update citation: Pet. App. A7.

---

[7] The statement of issues presented for review in Appeal No. 87-3761, is in the appendix herefor: Pet. App. A79.

[8] A long letter with update citations on the stationery of petitioners' counsel Cook & Cook, dated July 1, 1988, to Office of the Clerk, Sixth Circuit Court of Appeals, is in the Appendix herefor: Pet. App. A80-101.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

The judgment of the Court of Appeals was entered on August 24, 1988. The order denying the petition for rehearing and suggestion for rehearing en banc was filed on October 12, 1988. The statute which confirms jurisdiction on the Court to review the judgment in question is 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED FOR PETITIONERS' CASE

Each will be cited next below in relevant context to the format of petitioners' entire Complaint. In accord with Supreme Court Rule 21.1.(f), their pertinent text is printed in the Appendix herefor, following comment thereon and citation thereof.

Petitioners alleged subject matter jurisdiction in Complaint ¶1. Pet. App. A108.

Petitioners alleged four year statute of limitations for the action in Complaint ¶2: Pet. App. A109, in accordance with Title 15 U.S.C. §15b and Ohio Revised Code §2305.09: Pet. App. A134 and A135.

Petitioners' *FIRST COUNT* ¶¶34-45 and ¶¶78-80: Pet. App. A116-119 and A130-131, supported by ¶¶3-17 [ALLEGATIONS AS TO THE PARTIES]: Pet. App. A109-112 and ¶¶18-33 [ALLEGATIONS COMMON TO ALL COUNTS]: Pet. App. A112-116, was dismissed in its entirety on the basis of automatic retroactive application of the one year time bar *Rule* judicially created by the Court of Appeals in *Mulligan v. Hazard,* 777 F.2d 340 (CA6 1985).

The United States Constitutional provision applicable to the *FIRST COUNT* is Amendment 4: Pet. App. A135.

The Ohio Constitutional provisions applicable to the *FIRST COUNT* are Article I, §1 *Inalienable Rights* and Article 1, §14 *Search Warrants:* Pet. App. A136.

Title 42 U.S.C. §1983, applied to the second claim in ¶¶35-43 of the *FIRST COUNT* (Pet. App. A116-118), is printed at Pet. App. A136.

The third claim in the *FIRST COUNT*, ¶44 (Pet. App. A118), is predicated upon assertion of the civil rights action provisions of Title 42 U.S.C. §1988: Pet. App. A137.

An allegation common to *all COUNTS*, Complaint ¶24 (Pet. App. A113), asserts that the investigation by Niam Investigations of the business activities of petitioners was a licensed activity under color of state law. The applicable state law, Ohio Revised Code §4749.01, is printed at Pet. App. A138.

The *FIRST COUNT* relies upon common law definitions of tortious conduct and acts in concert or conspiracy with persons acting under color of state law. Such conduct and acts involve a trespass upon real property owned by petitioner Smith, a taking and detaining of personal property owned by both petitioners, and an injury to civil rights of both petitioners. Prosser, *Handbook of The Law of Torts*, is submitted in pertinent text excerpts as a definitional source for state common law on the torts of trespass to land, trespass to chattels and conversion: Pet. App. A139-141.

The Appendix herefor next prints an excerpt from Professor Prosser applicable to the common law underlying the *SECOND* and *THIRD COUNTS* (Pet. App. A119-122 and A122-127), setting forth the known and accepted difference between "abuse of process"[9] and "malicious prosecution": Pet. App. A141-142.

[9] In the Memorandum Opinion filed January 21, 1987 (Pet. App. A29-30), the District Court said—

> Plaintiffs' claim of abuse of process and the application of the sham exception to the *Noerr-Pennington* doctrine raises more difficult questions. Although normally such issues could only be resolved at trial, the Court feels that in the context of the unique factual background of this case, these questions do not raise an issue of material fact. * * *

The *SECOND* and *THIRD COUNTS* are based, in the alternative awaiting the proofs at trial, on 15 U.S.C. §1 and 15 U.S.C. §2: Pet. App. A142.

The petitioners' amendments to the *FIRST COUNT* ¶¶78-80 (Pet. App. A130-131), based upon post-filing discovery of documents from the files of Niam Investigation generally aver as to petitioner Smith's condition or state of mind prior to and on January 13, 1984. These allegations are in accord with Fed.R.Civ.P., Rule 9(b): Pet. App. A143.

Complaint ¶69 (Pet. App. A124) alleges that petitioner Smith was discharged by his full time employer on January 13, 1982, the date petitioner Smith was indicted by the state court Grand Jury. Although not specifically pleaded in the original Complaint, subsequent discovery depositions of respondent Kavanagh and private investigator Edward Niam filed with the clerk of the District Court could lead to a jury verdict that Kavanagh and Niam conspired with assistant county prosecutor Gasper to advise Richard R. Edminster, Esq., general counsel for the then current employer of petitioner Smith, about the pending indictment by the Grand Jury. Such conduct, if proven at trial, could be in violation of Ohio Revised Code §2939.18: Pet. App. A143.

Complaint ¶70 (Pet. App. A124) references Ohio Revised Code §2939.10 and §2939.20: Pet. App. A143-144. Discovery depositions filed with the clerk of the District Court, such as those of respondent Kavanagh and private investigator Edward Niam, could lead to admissible evidence for support of a jury verdict finding a violation of privacy of the Grand Jury contrary to Ohio Revised Code §2939.10 or §2939.18: Pet. App. A143.

STATEMENT OF THE CASE

The material facts of this case were operative from 1970 until March 24, 1987 as between adversary parties to this civil litigation. Also, the date facts as to the state and federal courts below overlap. The criminal proceeding in a Northeastern Ohio state court lasted from arraignment and plea of not guilty on February 22, 1982 to a judgment of expungement of conviction May 18, 1987. The pretrial civil case in a Northeastern Ohio district court was pending from November 18, 1985 until July 24, 1987. Three consecutive appeals to the Sixth Circuit began April 20, 1987 and were exhausted on October 12, 1988.

The material facts cannot all be drawn from part I of the opinion of the Court of Appeals filed August 24, 1988: Pet. App. A2-3. The writer may have condensed his facts from abridged facts found by the District Court in its Background statement for the first Memorandum Opinion filed February 19, 1986: Pet. App. A12-15.

In both courts below, the decisions made to favor all respondents key on two undisputed facts: *Fact 1,* a search and seizure by private persons at the home of petitioner Smith on December 8, 1981 without any official involvement by a state prosecutor or prosecutor's office; *Fact 2,* an alleged coerced plea bargain guilty plea to a lesser offense of receiving stolen property of a value less than $150.00 on January 13, 1984.

The original complaint filed November 18, 1985, ¶¶1-77, Pet. App. A108-129, alleged facts which are subject to proof at jury trial, with only minor amendments before trial.[10]

[10] Complaint ¶28 (Pet. App. A114) would be amended to read, "At *several times* prior to December 7, 1981, several identical *drafts of* affidavits were prepared *with the advice of counsel* for the signature of defendant Edwin M. Kavanagh: Said affidavits being based solely or completely based upon information conveyed to or provided *to* defendant Edwin M. Kavanagh *by counsel and by defendant Lawrence K. Hubbell* and *by* a person from said Niam Investigations." This proposed amendment is based upon discovered documents and deposition testimony taken from March 11, 1986 until June 3, 1986, and filed with the clerk of the District Court October 22, 1986.

The amended Complaint with ¶¶78-80, Pet App. A130-131, was submitted to the District Court, with exhibits in support, and a request for leave to file on January 23, 1986. The District Court permitted formal filing July 22, 1986. The exhibits in support included two "smoking gun" letters obtained by petitioners' discovery from the office files of Niam Investigation and addressed to respondents Kelley and Roche. These two letters, and six other letters exchanged between conspirators during days in 1984 following the conviction of petitioner Smith in the state court, are in the Appendix herefor: Pet. App. A162-173.

It is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.[11]

Petitioner Smith came to present counsel in the early fall of 1985. He came as a former employee, as a former Vice President and General Manager of an established firm, respondent C-E Cast Equipment. He was able to supply a business biography to support the Complaint ¶¶3(a)-(f) (Pet. App. A109-110) and define the relevant market for the antitrust claim in the *THIRD COUNT* by Complaint ¶62: Pet. App. A122.

When petitioner Smith came to counsel in 1985, he had no records (other than IRS and state tax returns retained by his accountant) relating to the business of Western Reserve Group, Inc. He explained that all business records relating to his company had been searched for and seized, taken away and never returned, the morning of December 8, 1981. He further explained that the office of his company was in the basement of his residence.

Petitioner Smith gave present counsel all the documents which he had preserved for almost four years. He did have a complete transcript and exhibits of the

[11] *Scheuer v. Rhodes*, 416 U.S. 232, 237 (1974).

pretrial phase of his state court criminal prosecution for trade secret felony theft from the corporate respondents.[12]

He also had a collection of newspaper and trade journal clippings and a VCR tape which were background for the "extensive media reporting and coverage" allegations in Complaint ¶33: Pet. App. A115-116. He also had a trade show type brochure which was used to prepare the relevant market and actual market definitions for the antitrust claim in the *SECOND COUNT,* Complaint ¶¶51 and 52: Pet. App. A120.

Upon reading the 822 page transcript and reviewing the 50 document exhibits, present counsel for petitioners determined that a common nucleus of operative facts would support two distinct but interwoven claims—civil rights and antitrust. Counsel engaged in a thought process, which may be defined by a precedent from the Court as an "evaluation of the characteristics of those claims relevant to the realistic life expectancy of the evidence and the adversary's reasonable expectations of repose." *Wilson v. Garcia,* 471 U.S. 261, at 282 (1985), O'Connor. *J.,* dissent.

The available 822 page transcript showed that concealed anticompetitive conduct by the respondents began in July, 1981, and did not surface until December 8, 1981. Then, petitioner Smith knew, by the search and

[12] Petitioner Smith was indicted by the Cuyahoga County, Ohio Grand Jury, January 13, 1982; was arraigned and pleaded not guilty on February 22, 1982, and retained a Cuyahoga County counsel for his defense. His counsel presented to the state court a timely filed motion to dismiss the indictments for good cause shown. From October 7, 1982 through December 20, 1982, the state court heard testimony and received evidence as to trade secret theft. The state court presided over eight hearings. The testimony of petitioner Smith and nine other witnesses, including respondents Kavanagh and Roche, was recorded in a transcript of 822 pages with about 50 document exhibits. During the next year, 1983, requests by petitioner Smith for speedy trial notwithstanding, the state court did nothing with the criminal case. Except for the expungement state law criminal process occurring after filing of the Complaint for petitioners' case, the relevant dates and events relating to use of state trade secret felony theft law by respondents against petitioners are pleaded with specificity in the Complaint. E.g., ¶¶70-76: Pet. App. A124-127.

seizure, that he and petitioner Western Reserve Group, Inc. were the target for anticompetitive conduct by respondents.

For the period December 8, 1981 until January 13, 1982, information from the recollection of petitioner Smith about the actions of the Combustion Engineering respondents in retaining the business records of petitioner Western Reserve Group, Inc. and the adverse publicity in the TV and print media about the business character of both petitioners, lead petitioners' counsel to conclude that monopoly power had been created for respondents against the new competition generated in a relevant market by petitioners.

In an ultimate sense, the respondents and non-party defendants in this case are businesses, businessmen or persons who routinely retain business records. Sufficient pretrial discovery has gone on before so that petitioners' case is ready for prima facia presentation at trial; except for limited additional discovery going to the amount or extent of damage to petitioners. Many, many documents corroborating complaint allegations have been discovered by petitioners. Eight documents involving the private investigator Niam and several individual respondents have been referred to above, at page 8. Still another document, originated by respondent Hubbell and sent to a management person of respondent C-E Cast Equipment, a letter document dated January 29, 1986 and requesting a payment of legal fees for defending this case because of participation in the investigation of petitioners, is in the Appendix herefor: Pet. App. A174-175.

Upon learning in 1981 that its customers were buying from an unknown competitor, the Combustion Engineering respondent acted as follows after an internal investigation:

(a) They hired a zealous private investigator;

(b) They identified and suborned a supplier to the petitioners, respondent Hubbell;

(c) They retained a prominent Cleveland law firm, Arter & Hadden;

(d) They requested respondent McGranahan to give a sworn statement to the law firm about conversations and a meeting with petitioner Smith in October, 1978;

(e) They encouraged respondent Kavanagh and the private investigator to seek out a county prosecutor;

(f) They asked assistance from the law firm to prepare an affidavit for respondent Kavanagh which was executed to obtain a search warrant in Summit County even though petitioner Smith was later indicted in Cuyahoga County;

(g) They had made a search and seizure at the home of petitioner Smith and office of petitioner Western Reserve Group, Inc. by private persons, respondent Fisher, investigator Niam and Niam's secretary on December 8, 1981;

(h) They had someone arrange for extensive newspaper and TV media coverage during and after the search of petitioners' home and office;

(i) After the search and seizure, and before petitioner Smith was indicted, they had the county prosecutor speak with general counsel for a present employer of petitioner Smith who was thereafter discharged from that full-time employment;

(j) They arranged weeks later after the search and seizure at petitioner Smith's home for the county prosecutor to seek an indictment of petitioner Smith on a felony charge of trade secret theft using Grand Jury testimony of respondent Kavanagh. Respondent Kavanagh gave his

testimony using a large drawing prepared at the office of respondent C-E Cast Equipment to show the business plans of petitioner Western Reserve Group, Inc. Respondent Kavanagh had prepared a 24" x 36" drawing showing the business organization, the customers and, the engineering drawings used by Western Reserve Group, Inc. to order products from its suppliers. The Kavanagh drawing also highlights as key personnel—Arter & Hadden, the Cuyahoga County Prosecutor and Edward Niam Investigations. The drawing was filed with the clerk of the District Court and shown to the Court of Appeals at oral argument as plaintiffs' Exhibit 12.[13]

(k) They promoted protraction and delay in the state court prosecution of petitioner Smith for two years;

(l) They agreed to ending of the state court prosecution if petitioner Smith would plead guilty to a misdemeanor charge and would pay restitution to the corporate respondents;

(m) They agreed to cancel a promissory note from petitioner Smith executed as restitution if petitioner Smith would give a noncompetitive covenant for an additional three years.

BASIS OF JURISDICTION IN THE U.S. DISTRICT COURT

15 U.S.C. §22; 28 U.S.C. §§1331, 1332 and 1343: Pet. App. A133-134.

---

[13] Exhibit 12 is further referenced in the Appendix herefor: Pet. App. A176. Information on the face of Exhibit 12 was compiled: from discarded envelopes taken by investigator Niam during a search of petitioner Smith's garbage, Complaint ¶22: Pet. App. A113; using information freely provided by respondent Hubbell, Complaint ¶25: Pet. App. A114; using information seized and taken away from petitioner Smith on December 8, 1981, Complaint ¶32: Pet. App. A115; and information from internal documents in the files of respondent C-E Cast Equipment.

ARGUMENT OF REASONS FOR ALLOWANCE OF THE WRIT

The interwoven issues of federal and state law presented by the facts of this case have been denied the light of a federal district courtroom and plenary trial with facts found by a jury. The facts of this case present questions of Fourth Amendment and Ohio Constitution guarantees, civil rights and liberties and Sherman Act wrongs: versus, multifaceted conspiracies and anticompetitive actions to the detriment of the process of fair market competition. The courts below have tried to provide an established firm facing competition in a relevant market from a fledgling firm founded by a former employee with absolute immunities from suit against anticompetitive conduct.

The present need of the antitrust bar and federal judges below to know the thinking of the Court about the interwoven issues of state and federal law here presented is exemplified by the ABA/Section of Litigation unpublished paper, Mannino, E.F., *Antitrust Remedies For A Former Employee Sued for Trade Secret Misappropriation:* Pet. App. A145-155. This paper is not a scholarly treatise; there is no theorem and there is no offered solution. The reported cases methodically indexed show that the Supreme Court has not spoken to the broad questions posed by current case law, perhaps, since 1977.

There is confusion and uncertainty as to what can and cannot be done when an established firm, a "big business", asserts claims for trade secret misappropriation against a former employee and his fledgling firm, a "small business":

> ". . ., new and small-to-midsized firms have provided this bulk of the twenty million new jobs created in the past decade." *U.S. News & World Report,* Dec. 26, 1988/Jan. 2, 1989 p. 124.

If the ultimate decision below is permitted to stand as law of the Sixth Circuit, injustice in the free enterprise system will become the norm. Such result is

regrettable; particularly for those who believe that patents, trademarks, copyrights, and bona fide trade secrets are the only monopolies for lawful assertion against emerging and successful competition. The respondents' patterns of conduct in this case should not become an acceptable rule of law, even in Sixth Circuit, for doing business in this country.

The Affirmed Dismissal Of The First Count, Which Included A Distinct Claim Based Upon Section 1983, On The Basis Of The One-Year Time Bar Created For All Cases Filed In Ohio Federal District Courts By Automatic Retroactive Application Of A Circuit Precedent Created By *Mulligan v. Hazard,* Was Wrong.

The decision by a panel of the Court of Appeals in *Mulligan v. Hazard,* 777 F.2d 340 (CA6 1985), *cert. denied* 476 U.S. 1174 (1986), was announced as precedent January 7, 1986. The Complaint filed by petitioners November 18, 1985, had a designated *FIRST COUNT,* ¶¶34-45: Pet. App. A116-119.

The *FIRST COUNT* was based on events known to have taken place on December 8, 1981. There was a trespass to land during an unlawful search. There was a trespass to chattels or conversion by an unlawful seizure.[14] There was an exercise of unlawful authority over the property of petitioners by private persons, respondent Fisher, investigator Niam and Niam's secretary, during the search and seizure.

The *FIRST COUNT* facts give rise to a set of three claims based on violations of guaranteed liberties: A state law claim in ¶34; a federal law claim under 42 U.S.C. §1983, ¶35; and a second federal law claim under 42 U.S.C. §1988 and based upon the Constitution and common law of the State of Ohio.

The realistic statute of limitations, a four-year time bar matching all of the claims in the *FIRST COUNT* is

[14] Petitioners cite authority for common law definitions of the torts trespass to land, trespass to chattels, and conversion, in the Appendix herefor: Pet. App. A139-141.

Ohio Revised Code Section 2305.09, Pet. App. A135, specifically pleaded by Complaint ¶2: Pet. App. A109.[15]

Gaff v. Federal Deposit Ins. Corp., et al., 828 F.2d 1145 (CA6 1987) is a current circuit precedent wherein a panel of the Court of Appeals held that separate claims in a Count must each be evaluated and "fully addressed", before a dismissal of the entire Count may be reviewed on appeal. *Id.*, at 1151.

The recent authority of *Gaff* was both cited and argued to the Court of Appeals just prior to oral argument: Pet. App. A89-91. After the decision filed August 24, 1988, Pet. App. A1-8, by a panel which did not accept the precedent of *Gaff*, the Court of Appeals was asked to rehear *En Banc* Question I, Pet. App. A63, in light of petitioners' rehearing argument for applying *Gaff*: Pet. App. A67.[16]

The panel of the Court of Appeals affirming the dismissal of the *FIRST COUNT* in its entirety neither accepted nor applied a mandate from the summary order of the Court in *Vodila v. Clelland*, _____ U.S. _____, 107 S.Ct. 3255, 97 L.Ed.2d 754 (1987). This decision was cited and argued to the Court of Appeals just prior to oral argument: Pet. App. A84-85.

After the decision filed August 24, 1988, which does not acknowledge any authority other than *Wilson v. Garcia, supra*, and *Mulligan v. Hazard, supra*, see, Pet. App. A4, the Court of Appeals was asked to rehear *En Banc* Question II, Pet. App. A63, in light of petitioners' rehearing argument for recognizing the authority of *Vodila v. Clelland:* Pet. App. A67-69.

---

[15] The pragmatic result of the courts below applying a one-year statute of limitation was a compulsory amendment, without evidentiary hearing, of petitioners' Complaint ¶2.

[16] The question of applicability of *Gaff* against blanket dismissal of *all claims* in the *FIRST COUNT* by retroactive application of *Mulligan v. Hazard, supra*, was expressly preserved for review by this Court: Pet. App. A67.

Prior to the decision by one panel of the Court of Appeals, filed August 24, 1988, two other panels (Judges Engel, Krupansky[17] and Guy and Judges Keith, Nelson and Boggs) had earlier accepted the authority of *Vodila v. Clelland, supra.*

The first decision was *Thomas v. Shipka* (II), 829 F.2d 570 (CA6 1987). The second decision was *Vodila v. Clelland* (II), 836 F.2d 231 (CA6 1987).

The panel in *Thomas* recognized that "[o]n June 26, 1987, the Supreme Court issued a summary order vacating the judgment of this court in *Vodila v. Clelland,* 802 F.2d 460, ... remanding the case for further consideration ...." *Id.,* at 572. The panel interpreted the *Vodila* mandate as leading to a conclusion of law that the decision in *Mulligan* "represented a departure from clear precedent which had established a longer period of limitations for §1983 claims filed in Ohio." *Id.*, at 573.

When the panel for *Vodila* took up the mandate from the Court, they had no difficulty in finding a conclusion of law:

> The Supreme Court's action, as our court recently had occasion to observe in another case, "compels the conclusion that the one-year statute of limitations adopted in *Mulligan* for all §1983 claims brought in Ohio is *not* to be automatically applied retroactively and that the decision as to retroactivity must be made on a case-by-case basis." (836 F.2d, at 232).

The *Vodila* panel refined the mandate of the Court, considered the panel decision in *Thomas,* and established a rule of law calling for a showing by a plaintiff-appellant of "clear past precedent" or "clear circuit precedent" of stature sufficient to offset automatic retroactive application of the one-year time bar promulgated for Ohio cases by *Mulligan v. Hazard, supra, Id.,* at 232-233.

[17] Petitioners' signatory counsel observes that Circuit Judge Robert B. Krupansky, Cleveland, Ohio, also was a member of the panel (together with Judges Lively and Merritt) who rendered the Court of Appeals decision for which review is sought.

The petitioners offered a citation of nine clear past precedents prior to December 8, 1982, one year after the search and seizure, to the Court of Appeals on two occasions. First, was just prior to oral argument: Pet. App. A87-89. Second, after the composition of the panel was known, by the submission for rehearing and suggestion for rehearing *En Banc:* Pet. App. A69-71. For whatever the reason, it is clear that the panel of the Court of Appeals rendering the decision of August 24, 1988, shows almost a wooden determination to not lift the immunity of a one-year time bar granted to respondents by the District Court. The action by a later panel goes against the action of two earlier panels and is wrong, on the merits, and is of sufficient importance as to warrant exercise of this Court's power of supervision.

A Statute Of Limitations For A Section 1983 Case Awaiting Published Decision By The Court.

Owens v. Okure, No. 87-56, *cert. granted* March 22, 1988, was argued to the Court November 1, 1988 (57 U.S.L.W. 3359) and in the time available for preparation of this petition for writ of certiorari has not been decided.

Okure v. Owens, 816 F.2d 45 (CA2 1987) and *Owens v. Okure,* No. 87-56, were both cited and argued to the Court of Appeals just prior to oral argument: Pet. App. A93-95.[18]

The Failure Of The Courts Below To Deny Or Limit An Extension Of The Noerr-Pennington Doctrine Is Wrong In Light Of Two Recent Decisions By The Court.

On two occasions, the Court of Appeals was asked to consider respondents' immunity defense under the *Noerr-Pennington* doctrine because of *Patrick*

[18] Petitioners' signatory counsel knows that predicting for a court of appeals what the Supreme Court of the United States will decide for a given case is a very, very "dangerous game". Such predictions may be justified in the extreme case, as here, where a judgment of a district court should not be affirmed by a court of appeals.

v. Burget, 486 U.S. _____, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988), and *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. _____, 108 S.Ct. 1931, 100 L.Ed.2d 497.

The first time was just prior to oral argument: Pet. App. A97-99.[19] The second time, after the panel decision filed August 24, 1988, Pet. App. A62, 63, 71-75. The panel decision by the Court of Appeals does not acknowledge *Patrick v. Burget, supra.* The panel opinion concluded—

> "*Allied Tube* does not speak to the present case, where the defendants resorted to the courts." Pet. App. A7.

The Court should say for the edification of Sixth Circuit what was meant by *Patrick* and *Allied Tube.*

The Courts Below Were Wrong In Refusing To See That The Tort Of "Abuse Of Process", Not "Malicious Prosecution", Was The Appropriate Objective Test For Evaluating Respondents' Conduct In Resorting To State Court Prosecution Until Petitioners Pled Guilty.

Petitioner Smith was indicted January 13, 1982, arraigned and pled not guilty on February 22, 1982, and eventually became the subject of a plea bargain agreement requiring his plea of guilty nearly two years later on January 13, 1984.

The District Court denied petitioners' contention that respondents' conduct came within the "sham exception" to the *Noerr-Pennington* doctrine. Petitioners' argument was rejected because both courts below adopted language from a circuit precedent, *Potters Medical Center v. City Hospital Ass'n*, 800 F.2d 568 (CA6 1986) to support a holding "that the defendants could not be found to have fostered a baseless prosecution since they prevailed in their position when the plaintiffs plead guilty." Court of Appeals decision filed August 24, 1988: Pet. App. A7.

---

[19] The letter for petitioners, filed July 1, 1988, reacquainted the Court of Appeals with the fact that petitioner had cited and argued at length in a brief for Appeal No. 87-3657 *Indian Head, Inc. v. Allied Tube & Conduit Corp.*, 817 F.2d 938 (CA2 1987) Pet. App. A98.

Petitioners argued for Appeal No. 87-3378 (blue cover Brief at pg. 13), that the District Court's reliance on *Potters Medical* exhibits a misinterpretation of the tort of abuse of process. "The fact that [respondents'] position prevailed does not require a finding that [petitioners'] claim of abuse of process must fail. Unlike cases involving a claim of malicious prosecution, termination of the criminal litigation in favor of [petitioners] is not a prerequisite to a successful abuse of process claim." Petitioners' best authority at the time was a decision from the Ninth Circuit, *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau*, 690 F.2d 1240, 1263-1264 (CA9 1982), *cert. denied* 459 U.S. 1227 (1983).[20]

The record below includes two letters to the District Court from counsel for opposing parties: Pet. App. A102-104 and A105-107. The letter for petitioner dated March 1, 1987, cites a case from Seventh Circuit, *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466 (CA7 1982), made relevant to the controversy in this case by extensive analysis thereof on abuse of process and the *Noerr-Pennington* doctrine, in a dissent from *Westmac, Inc. v. Smith*, 797 F.2d 313, (CA6 1986) at 320-323, *cert. denied* 107 S.Ct. 885 (1987). Respondents' letter dated March 12, 1987 seems to have said that the District Court should not rely on a Sixth Circuit dissent because of the later Sixth Circuit decision in *Potters Medical*, and also because *Potters Medical* is in conflict with the Seventh Circuit and their decision in *Grip-Pak*.

Petitioners asked for *En banc* reconsideration based upon this Court's decisions in *Patrick* and *Allied Tube*, both *supra*, as narrowing and restricting judicially created immunity for anticompetitive conduct so that the *dissent* in *Westmac* should be adopted so that an abuse of process falls within the sham exception to the *Noerr-Pennington* doctrine defense: Question III, Pet. App. A63.

[20] Petitioners' further argument, *infra* page 29 speaks to *Clipper Exxpress* in the context of the scholarly writing, Bradley, L.D., 69 Cornell L. Rev. (Aug. 1984).

The dissent in *Westmac* argues, citing *Grip-Pak*—"The difference between abuse of process and malicious prosecution is that the former does not require proving that the lawsuit was brought without probable cause"—797 F.2d at 320. The dissent cites Dean Prosser, *Id.*, at 321, as did petitioners to the Court of Appeals: Pet. App. A96-97 and, as now do petitioners to this Court: Pet. App. A141-142. The dissent further cites The Restatement of Torts, *Id.*, also at 321.[21]

The facts when *Potters Medical, supra* was argued to the Court of Appeals involved competing health care facilities and alleged conspiracies including Social Security Act certification and Blue Cross participating hospital contracts. The facts underlying the dissent in *Westmac*—"*[T]he competitor would be driven out of the market by factors related to the litigation process itself—cost, delay, damage to reputation, decreased sales, etc.—long before any judgment in the action is rendered.*" *Id.*, at 322,—approximate the pleaded and discovery-corroborated actions of respondents deployed for monopolistic purpose in 1981 long before the petitioners' guilty pleas in January, 1984.

The Courts Below Were Wrong In Thinking That Any Degree Of Success On The Merits Of A State Court Prosecution For Felony Theft Of Trade Secrets Has Preclusive Effect Warranting Application Of The Noerr-Pennington Doctrine.

In January 1982, petitioner Smith was arraigned on a four count indictment including state trade secret felony theft law. On January 13, 1984, respondents obtained a guilty plea to a misdemeanor charge of receiving stolen property having a value less than $150.00.

Petitioners argued for Appeal No. 87-3657 *In Re Burlington Northern, Inc.*, 822 F.2d 518 (CA5 1987) *cert. denied* as *Union Pacific Railroad Co. v. Energy*

[21] *One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process.* Restatement (Second) of Torts §682 (1977).

Transportation System, Inc., No. 87-705, _____ U.S. _____ (1988) (56 U.S.L.W. 3447). This citation was updated for the Court of Appeals just prior to oral argument: Pet. App. A82 and A99-100.

The apparent reasoning of the courts below conflicts with the *Burlington* decision from the Fifth Circuit.

> Our interpretation of the sham doctrine in *Coastal States* makes clear that success on the merits does not necessarily preclude an antitrust plaintiff from proving that the defendant's earlier litigation activities were sham. The determinative inquiry is not whether the suit was won or lost, but whether it was significantly motivated by a genuine desire for judicial relief. Of course, the success of the claim presented is persuasive evidence that the litigant in fact wanted the relief. It is highly unlikely that a party with a meritorious claim will not be significantly motivated by a desire to obtain relief on that claim. Thus, an antitrust plaintiff attempting to base liability on successful petitioning must overcome a strong inference that *Noerr-Pennington* applies and in many cases may be unable to do so. But reliance on the success of the earlier claim cannot substitute for proper consideration of any evidence the plaintiff might provide of the petitioner's motivation. *Id.*, at 528.

The degree of "success on the merits" question as a matter of federal law antitrust policy can be decided by this Court on the facts of this case.

The Courts Below Were Wrong In Not Expecting Or Requiring Testimonial Or Affidavit Evidence From Respondents Or Their Attorneys That Any Or All Of Them Were Acting In "Good Faith" When Seeking Out The Participation Of A State Prosecutor Or The Prosecutor's Office For Further Actions Of Anticompetitive Conduct Creating Monopoly Power.

The formal Complaint for this case was verified twice by petitioner Smith: Pet. App. A129 and A132. As the case proceeded in stages through the District Court

below, petitioner Smith filed sworn affidavits as to factual issues: Pet. App. A156-157 and A158-161. At no time since the filing in November, 1985, has any respondent submitted any sworn or attested affidavit or document of "good faith" drawn to affirm or deny factual issues raised by the Complaint involving respondents and their advisors vis-a-vis the state prosecutor or the prosecutor's office.

Duncan v. Peck, 844 F.2d 1261 (CA6 1988) was cited for the Court of Appeals just prior to oral argument: Pet. App. A83. *Duncan* was focused for rehearing *En Banc* by Question IV: Pet. App. A63-64, and by petitioners' assertion—"*Ends must not always justify means.*"—: Pet. App. A75.

The apparent reasoning of the panel may conflict with and disregard its very own new circuit precedent. Defendants in an antitrust case seeking immunity by summary judgment for anticompetitive conduct alleged to be conspiratorial and predatory, must have some or a minimal evidentiary burden. *Duncan* seems to require that respondents grant of summary judgment relief on the basis of a *Noerr-Pennington* immunity defense must have at the very least produced "affidavits in the District Court from him and his attorney stating that he acted solely on the advice of his attorney." *Id.,* at 1267-1268.

The use or nonuse of "good faith" affidavits to support a *Noerr-Pennington* immunity defense for facts including "resort to the courts" should be decided by this Court on the facts of this case.

The Court Of Appeals Below Was Wrong To Not Acknowledge The First Circuit Opinion In *CVD, Inc. v. Raytheon Co.* Which Set Forth An Antitrust Policy Dealing With Assertions Of Trade Secret Claims Against Competitors.

The case *CVD, Inc. v. Raytheon Co.,* 769 F.2d 842 (CA1 1985) was brought to the Court for review as *Raytheon Co. v. CVD, Inc.,* No. 85-1060, *cert. denied* in

February, 1986, 475 U.S. 1016. The impact of this case on antitrust law policy outside the First Circuit is evident from the ABA/Section of Litigation paper, Mannino, E.F., *Antitrust Remedies For A Former Employee Sued For Trade Secret Misappropriation:* Pet. App. A145, at A155.

The precedent value of *CVD, Inc.* even though from another circuit, was cited and argued to the Court of Appeals below just prior to oral argument—*Assertion of trade secret claim in bad faith is a predatory practice under antitrust laws*—: Pet. App. A82.

By petition for rehearing, *CVD, Inc.* was again cited as authority for the argument specific to petitioners' case—*When the state grand jury indicted, there were mere allegations of several crimes which can be shown at a plenary trial on the merits as having been capable of no reasonable proof. At trial, a false assertion by the Combustion Engineering defendants of trade secrets will be shown as yet another form of antitrust violation*—: Pet. App. A74.

The Court could determine the precedent value of *CVD, Inc.* on the facts of this case.

Both Courts Below Were Wrongly Influenced To Think That Antitrust Law Defendants With The Good Reputation And Business Stature Of Combustion Engineering, Inc., Would Never Indulge In Predatory Litigation In The Context Of Baseless Trade Secret Claims.

The problem for antitrust law policy set forth by the scholarly writing, *Note,* Smith, E., *Santa Clara L. Rev.,* Vol. 23, 1095 *et seq.* (1983) is framed by the title—*Eliminating Predatory Litigation In the Context of Baseless Trade Secret Claims: The Need For A More Aggressive Counter Attack.*

In the *Note,* Part I, *Introduction*—Abuse of the judicial process is hardly a novel problem, yet its impact in the area of trade secret litigation uncovers particularly

fascinating and unsettled issues. Consider, for example, the following hypothetical situation . . . The employer . . . [in] its evaluation of the trade secret claim and the loss it will suffer at the hands of the departing employees is often colored by emotion . . . litigation instigated by the former employer can be used as an anticompetitive tool. Established companies some times pursue a baseless trade secret claim for the purpose of harassing or eliminating an incipient competitor. The new company is forced to utilize its limited capital and manpower to fend off the baseless lawsuit. . . . *Id.*, at 1095-1096.

The *Note* continues: The element of improper purpose requires the trade secret defendant to show coercion on the part of the trade secret plaintiffs in order to obtain a collateral advantage . . ., there may be an *actionable abuse of process where it can be shown that the plaintiff filed the trade secret claim in order to coerce the defendant into entering certain business arrangements with it.*[22] *Id.*, at 1114-1115.

Petitioners chose for federal court jurisdiction the antitrust remedy, discussed by the *Note* author beginning at 1116. Petitioners were met in both courts below by an "emergence of the *Noerr-Pennington* Doctrine", *Id.*, at 1118. Neither court below thought compelled to accept the sham exception to *Noerr*, which "illustrates the judiciary's recognition of the potential anticompetitive effects of baseless lawsuits." *Id.*, at 1119; for the sole and decisive reason, the pleas of guilty by petitioner Smith on January 13, 1984.

The *Note* author did not have reported, in 1983, a business tort case such as now sent out from Sixth Circuit to students of antitrust law policy by *CCH Tr. Reg. Rep.* ¶¶68, 224.

---

[22] Point for petitioners' case: Respondent Kelly obtained by the plea bargain arrangement a noncompetitive covenant for an additional three years. Complaint ¶75: Pet. App. A126.

The Court Of Appeals Was Not Correct In Its Citation And Application Of *United Airlines v. Evans*, 431 U.S. 553 (1977).

Based on newly discovered evidence, petitioners sought and were eventually granted leave to file an amendment adding Complaint ¶¶78-80, and a later date for cause of action accrual, January 13, 1984. The amendments were based on facts shown by letters subpoenaed from the office files of Niam Investigations, Complaint ¶24: Pet. App. A113. Several of these letters are printed in the Appendix herefor: Pet. App. A162-173. These letters, particularly plaintiffs' Exhibit 2, a letter from Niam to respondent Kelly dated January 27, 1984, describe a *Kafkaesque* experience for petitioner Smith, with only dark at the end of the tunnel.

Petitioners argued to the Court of Appeals in the context of *Noerr-Pennington* and the SECOND and THIRD COUNTS—*Long before the guilty pleas were entered plaintiff Smith suffered loss of employment and income, paid expensive attorneys fees, was the subject of public disgrace and humiliation, and was burdened by the psychological trauma of over two years of uncertainties*: Pet. App. A74.

Petitioners' Question V in the suggestion for rehearing as to the *FIRST COUNT*, Pet. App. A64, asked whether the Panel has failed to understand the factual base, as evidenced by Exhibit 2, for the "present effect and therefore continuing violation" alleged in Complaint ¶¶78-80.

The District Court never wrote directly to the question of the amended Complaint and the cause of action accrual date January 13, 1984 as legal issues. The District Court did write —*The Court concludes that plaintiffs are essentially asking the Court to set aside their guilty pleas, something which the Court has no power to do. The plaintiffs instead must pursue such relief through post-conviction procedures in the state court system*: Pet. App. A36, Order filed March 24, 1987.

Two months later, on May 18, 1987, the state court did the only thing it could do "to set aside their [petitioners'] guilty pleas", the state court ordered the record of conviction based on the misdemeanor guilty plea of petitioner Smith expunged.[23]

Argument As To Subsidiary Questions Arising From The Third Appeal Taken By Petitioners To The Court Of Appeals.

Petitioners filed the notice of appeal August 5, 1987, which became the third matter for petitioners in the Court of Appeals, Appeal No. 87-3761. This third appeal was taken from an order of the District Court filed July 24, 1987: Pet. App. A43-45.

By this appealed order, the District Court agreed with reasoning presented by counsel for the Combustion Engineering respondents—The Ohio expungement law "was not intended to be used by an offender as a sword to retaliate against the individuals who brought him to justice." Pet. App. A44.

The fallacy of this logic was argued at length for petitioners by the blue cover *and* grey cover briefs for appellants in Appeal No. 87-3761. The petitioners presented two questions, broad and specific. *First,* whether full faith and credit and the state court judgment of expungement have an effect on earlier judgments of the District Court. *Second,* whether the order of July 24, 1987, went against the Constitution, Article 4, Section 1, and federal statutes and the Ohio expungement statute, or the Rules of Evidence: Cf.,: Pet. App. A79.

The broad and specific undecided questions in Appeal No. 87-3761—based on facts of the case showing an established firm using state trade secret felony theft law to prosecute in state court a former employee and his fledgling firm, two years later a coerced misdemeanor guilty plea with restitution and parole, and still later, during federal court counterattack by the former employee and his fledgling firm, the state court expunges

[23] The Ohio law on "expungement" applies only to natural persons and does not apply to businesses such as corporations.

the record based on the allegedly coerced guilty plea—could arise again in other business tort cases, and should be settled by this Court.

The Courts Below May Have Been Influenced Or Biased In Favor Of Respondents By An "Antitrust Policy To Take Account Only Of Efficiency Concerns."

Professor Hovenkamp[24] published an article, 84 Mich L. Rev. 213 (1985), *Antitrust Policy After Chicago,* summarized by the law review editor as arguing "that even if it were appropriate for antitrust policy to take account only of efficiency concerns, the Chicago School's neoclassical efficiency model is not sophisticated enough to account for real world behavior."

The anticompetitive conduct of respondents against petitioners was "efficient". Dollar amounts in evidence in the District Court can project to a high benefit/cost ratio. Petitioners assert that respondents did not meet their emerging competition in the market by offering equivalent products to mutual customers at an equal or lower cost with equal or better delivery. Rather, as the Court of Appeals has said, respondents "resorted to the courts"; Pet. App. A7.

The record below, available to the Court pursuant to Supreme Court Rule 19, includes a deposition transcript for testimony of respondent Kavanagh taken May 20, 1986. At Tr. 81, Kavanagh begins his testimony about a discovered document, plaintiffs' Exhibit 20-3,[25] and confirms his handwriting showing the following amounts: For "Investigation" of petitioners, "Total Expenses" as of "10-26-83" of only $97,152.85. This total included: for Arter & Hadden legal assistance, §14,934.25; and for private investigator Niam, $77,735.07. Petitioners assert that the predatory litigation produced an incredibly high and efficient benefit/cost ratio: X X X sales ÷ $97,152.85 out-of-pocket expenses.

---

[24] The stature of Professor Hovenkamp (now at University of Iowa, College of Law, Iowa City, Iowa), has been recognized by the Court by citation of *P. Areeda & H. Hovenkamp, Antitrust Law, Allied Tube Corp. v. Indian Head, supra,* footnote 10, and elsewhere in that case.

[25] Exhibit 20-3 is an internal document from the files of respondent C-E Cast Equipment, of the type referenced in footnote 13, *supra.*

The Writings of Scholar Authors Attest to Public Importance of Questions Presented by this Case.

(A) Meyer, D.L., *A Standard for Tailoring Noerr-Pennington Immunity More Closely to the First Amendment Mandate,* 95 Yale Law Journal 832 (1986).

This *Note* proposes that immunity not be granted when a group's petitioning produces unnecessary direct antitrust injury *and* the governmental action sought by the group is illegitimate. Such a rule would deter undesirable direct injury and would force groups to consider less injurious alternatives when petitioning for anticompetitive results. *Id.*, at 832.

The courts below relied only on the late pleaded *Noerr-Pennington* doctrine to provide immunity from antitrust suit for all respondents, including Hubbell, the product supplier to petitioners who never took one step toward a county prosecutor or a state court. The courts below did not make any effort to recognize the "sham exception" other than to hold that the exception did not apply because petitioners pled guilty. To paraphrase the *Note* author Meyer, *Id.*, at 856, the courts below failed to take into account the inevitability of direct injury inflicted by respondents and the illegitimacy of state court criminal prosecution sought by collusive petitioning activities, and have therefore tolerated a dangerous amount of injurious conduct.

Consistent with the theorem of the *Note* author, petitioners suggest that the facts of this case could support a modification to the *Noerr-Pennington* doctrine—

> **No antitrust claim by a former employee and founder of a fledgling firm can be barred using the Noerr-Pennington doctrine when a causal connection exists between the antitrust violation and the harm to the former employee and the fledgling firm, and the harm was intended by the established firm.**

(B) Bradley, L.D., 69 Cornell Law Review 1305, (1984), wrote a *Note* for the topic *Noerr-Pennington Immunity From Antitrust Liability Under Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.: Replacing the Sham Exception With A Constitutional Analysis.*

In the courts below, petitioners matched up *Clipper Exxpress* (Ninth Circuit) against *Potters Medical* (Sixth Circuit).

A later decision from Ninth Circuit was cited and argued to the Court of Appeals just prior to oral argument, *Sessions Tank Liners, Inc. v. Joor Manufacturing, Inc., et al.*, 827 F.2d 458 (CA9 1987): Pet. App. A84 and A100. *Sessions* is a *Noerr-Pennington* case involving a model fire code for underground gas storage tanks. *Sessions* cites *Clipper Exxpress* as circuit precedent for three points: (1) The crucial question, as we see it, is whether these asserted improprieties amounted to an "abuse of process", *Id.*, at 465; (2) Antitrust immunity under *Noerr-Pennington* does not extend to private parties who have entered into a "conspiracy" with governmental actors. *Id.*, at 466; and (3) An antitrust plaintiff cannot summon the "sham" exception by alleging that defendant made misrepresentations when pursuing *legislative as opposed to adjudicative—action, Id.*, at 467 (emphasis added).

The facts of petitioners' case reach the same questions decided by the *Clipper Exxpress* and *Sessions* analysis. The facts, however, go beyond these Ninth Circuit decisions because the "adjudicative action" was not merely a civil action in state or federal court, but was a state court prosecution under state trade secret felony theft law.

These questions should be settled by this Court on the facts of this case.[26]

[26] Petitioners' letter of July 1, 1988 advised the panel of the Court of Appeals that both sides in *Sessions* had sought review by the Supreme Court of the Ninth Circuit opinion. Petitioners' counsel

(Footnote continued on following page.)

CONCLUSION

Petitioner Smith comes to seek review by this Court of record, but not trial, facts construed by both federal courts below as inadequate to sustain a plea for relief. The respondents must still stand in awe since their business activities were helped and immunized by the courts below: First in state court where they were the moving parties; Second, in federal court where they were the winning parties. The facts in the Complaint, corroborated by pretrial discovery as to motive, intent and business purpose of respondents, are those which demonstrate conduct used for efficient destruction of business competition. The maxim amongst respondents may be "Whatever is good for Combustion Engineering is good for the Country." But, the facts of this case provide this Court with opportunity to stand the Constitution, the civil rights laws and the Sherman Act up against success and accomplishment of a business purpose. For these reasons, this Court could acknowledge that there are public questions of exceptional importance awaiting review by grant of this petition for writ of certiorari to the Sixth Circuit Court of Appeals.

Respectfully submitted,

MACK D. COOK, II, *Counsel of Record*
900 First National Tower
Akron, Ohio 44308-1418
Attorney for Petitioners
Lester W. Smith and
Western Reserve Group, Inc.

Of Counsel
COOK & COOK
REBECCA H. COOK

(Footnote continued from preceding page.)
predicted to the Sixth Circuit how this Court might decide; concluding with the sentence—Either way, the result of Supreme Court action will favor plaintiffs' appeal,—: Pet. App. A100-101. The way it turned out, on June 27, 1988 the Court granted both petitions, vacated the Ninth Circuit judgment, and remanded for further consideration in light of *Allied Tube*. See _____ U.S. _____, 108 S.Ct. 2862, 101 L.Ed.2d 899.

88-1134

No. _____

FILED
JAN 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1988

LESTER W. SMITH and WESTERN RESERVE GROUP, INC.,
Petitioners,

vs.

COMBUSTION ENGINEERING, INC., C-E CAST EQUIPMENT, JAMES F. CALVERT, GEORGE E. FISHER, JR., LAWRENCE K. HUBBELL, EDWIN M. KAVANAGH, JAMES B. KELLY, JAMES E. KLIMA, THOMAS E. McGRANAHAN, WILLIAM FRANCIS ROCHE, ARTHUR F. SANTRY, JR., and FG DOE, EN ROE and JB LOE,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals For the Sixth Circuit

MACK D. COOK, II, *Counsel of Record*
COOK & COOK
900 First National Tower
Akron, Ohio 44308
Telephone (216) 376-1005

Attorney for Petitioners Lester W. Smith and Western Reserve Group, Inc.

REBECCA H. COOK,
Of counsel

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

182 pp

TABLE OF CONTENTS

Decision by a Panel of the Sixth Circuit Court of Appeals, Appeals Nos. 87-3378 and 87-3657, Affirming the Judgment of the District Court (August 24, 1988) A1

District Court Order Limiting Discovery by Petitioners (January 3, 1986) A9

District Court Memorandum Opinion (February 19, 1986) A11

District Court Judgment Entry (February 19, 1986) A22

District Court Order (July 29, 1986) A23

District Court Memorandum Opinion (January 21, 1987) A26

District Court Judgment Entry (January 21, 1987) . A31

District Court Memorandum Opinion (March 24, 1987) A32

District Court Judgment Entry (March 24, 1987) ... A34

District Court Order (March 24, 1987) A35

District Court Order (March 24, 1987) A38

District Court Memorandum Opinion (June 10, 1987) A39

District Court Judgment Entry (June 10, 1987) A42

District Court Order (July 24, 1987) A43

Order of the Court of Appeals for the Sixth Circuit Denying Petition for Rehearing (October 12, 1988) A46

Order of the Court of Appeals for the Sixth Circuit Consolidating Appeals Nos. 87-3378, 87-3657 and 87-3761 (November 9, 1987) A48

Order of the Court of Appeals for the Sixth Circuit Dismissing Appeal No. 87-3761 (April 11, 1988) . . A49

Calendar Coordinator, Court of Appeals for the Sixth Circuit, Letter Dated May 26, 1988, Setting Oral Argument for Appeals Nos. 87-3378 and 87-3657 with Leave to File Update Citations A53

Order of the Court of Appeals for the Sixth Circuit Denying Request for Additional Time for Oral Argument of Appeals Nos. 87-3378 and 87-3657 (June 9, 1988) A55

Order of the Court of Appeals for the Sixth Circuit (July 27, 1988) A56

Petitioners' Statement of Issues Presented for Review, Court of Appeals for the Sixth Circuit, Appeal No. 87-3378 ..... A57

Petitioners' Statement of Issues Presented for Review, Court of Appeals for the Sixth Circuit, Appeal No. 87-3657 ..... A58

State Court Judgment of Expungement (May 18, 1987) A59

Petitioners' Submission to the Court of Appeals for the Sixth Circuit for Reconsideration and Rehearing *En Banc* of Appeals Nos. 87-3378 and 87-3657 ..... A62

Petitioners' Statement of Issues Presented for Review, Court of Appeals for the Sixth Circuit, Appeal No. 87-3761 ..... A79

Letter for Petitioners, Dated July 1, 1988, List of Citations Updating the Briefs of Appellants for Appeals Nos. 87-3378 and 87-3657 ..... A80

Petitioners' Letter Dated March 1, 1987 to District Court Citing Westmac, Inc. v. Smith, 797 F.2d 313 (6th Cir. 1986) and Grip-Pac, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466 (7th Cir. 1982) A102

Letter on Behalf of Respondents Combustion Engineering Dated March 12, 1987, Responding to Petitioners' Letter of March 1, 1987, and Defining a Conflict Between the Sixth and Seventh Circuit on Immunity Under the Noerr-Pennington Doctrine A105

Petitioners' Complaint Filed November 18, 1985 in District Court A108

Petitioners' Amended Complaint Filed July 22, 1985 ..... A130

15 U.S.C. §22 ..... A133

28 U.S.C. §1331 ..... A133

28 U.S.C. §1332 ..... A133

28 U.S.C. §1343 ..... A134

15 U.S.C. §15b A134

Ohio Rev. Code §2305.09 ..... A135

U.S. Constitution, Amendment 4 ..... A135

Ohio Constitution, Article 1, §1 ..... A136

Ohio Constitution, Article 1, §14 ..... A136

42 U.S.C. §1983 ..... A136

42 U.S.C. §1988 ..... A137

Ohio Rev. Code §4749.01 ..... A138

Prosser, The Law of Torts, Fourth Edition, West Publishing Co. (1971), Chapter 3, 13, p. 63 (Trespass to Land) A139

Prosser, The Law of Torts, Fourth Edition, West Publishing Co. (1971), Chapter 3, 14, p. 76 (Trespass to Chattels) A139

Prosser, The Law of Torts, Fourth Edition, West Publishing Co. (1971), Chapter 3, 15, pp. 79, 80, 83 and 87 (Conversion) A140

Prosser, the Law of Torts, Fourth Edition, West Publishing Co. (1971) Chapter 22, 121, pp. 121-122 (Abuse of Process) A141

Title 15 U.S.C. §1 ..... A142

Title 15, U.S.C. §2 ..... A142

Federal Rules of Civil Procedure 9(b) A143

Ohio Rev. Code §2939.18 ..... A143

Ohio Rev. Code §2939.10 ..... A143

Ohio Rev. Code §2939.20 ..... A144

Antitrust Remedies for a Former Employee Sued for Trade Secret Misappropriation, ABA, Section of Litigation, unpublished paper 531-0023/4T, © 1988 ..... A145

Affidavit of Lester W. Smith (January 28, 1986) A156

Affidavit of Lester W. Smith (December 10, 1986) A158

Letter, Edward Niam to James B. Kelly, January 27, 1984 ..... A162

Letter, Edward Niam to William F. Roche, February 3, 1984 ..... A164

Letter, Edward Niam to Peter Phipps, January 30, 1984 ..... A166

Letter, Edward Niam to Tom Beres, February 1, 1984 ..... A167

Letter, Edward Niam to Richard Lobo, February 1, 1984 ..... A168

Letter, Edward Niam to Assistant Prosecutor Gasper, January 30, 1984 ..... A170

Letter, Edwin M. Kavanagh to Edward Niam, January 16, 1984 ..... A171

Letter, Edward Niam to Edwin Kavanagh, February 1, 1984 ..... A172

Letter, Lawrence K. Hubbell to Donald L. Southam, January 29, 1986 ..... A174

Note (Exhibit 12) A176

APPENDIX

DECISION BY A PANEL OF THE SIXTH CIRCUIT COURT OF APPEALS, APPEALS NOS. 87-3378 AND 87-3657, AFFIRMING THE JUDGMENT OF THE DISTRICT COURT

(Filed August 24, 1988)

[NOT RECOMMENDED FOR FULL-TEXT PUBLICATION]

No. 87-3378
No. 87-3657

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LESTER W. SMITH and
WESTERN RESERVE GROUP, INC.,
Plaintiffs-Appellants,

v.

COMBUSTION ENGINEERING, INC., *et al.*,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

Before: LIVELY, MERRITT, and KRUPANSKY, *Circuit Judges.*

LIVELY, *Circuit Judge.* The plaintiffs appeal from a series of district court orders culminating in final judgment for all defendants. The plaintiffs sought

damages for alleged civil rights and antitrust violations in a complaint containing three counts and eighty numbered paragraphs.

I.

According to the complaint the plaintiff Smith who was formerly an officer of C-E Cast Equipment, became a shareholder, director and president of Western Reserve Group, Inc. two years after leaving C-E Cast Equipment. Sometime thereafter the defendant Kavanagh, who was in charge of the replacement parts division of C-E Cast Equipment, discovered that one of its customers had found a new supplier for replacement parts formerly furnished to it by C-E Cast Equipment. Kavanagh hired Niam Investigations to determine the circumstances surrounding the customer's decision to find another supplier. The investigation implicated Smith and Western Reserve Group. Kavanagh and another person allegedly working for C-E Cast Equipment gave information to a state prosecutor's office concerning suspected criminal activity by Smith and Western Reserve Group that provided the basis for a search warrant for Smith's residence. As an incident to the search, officers seized property belonging to Smith and Western Reserve Group.

Thereafter Smith was indicted on the basis of grand jury testimony of Kavanagh and Edward Niam and evidence seized during the search. The four-count indictment charged Smith with theft or conversion of services, criminal simulation and possession of criminal tools. After first pleading not guilty, Smith later entered into a plea agreement with the state prosecutor by which he pled guilty to the misdemeanor charge of receiving stolen property of a value of less than $150, a lesser included offense to one of the indictment counts, and agreed to plead guilty on behalf of Western Reserve

Group to the criminal simulation charge, a fourth degree felony. Smith received a suspended sentence and fine and was placed on one year's probation. Western Reserve Group was fined $5,000 on a guilty plea entered on its behalf by Smith. A condition of Smith's probation was that he would pay to Combustion Engineering, Inc., the corporate parent of C-E Cast Equipment, the sum of $25,000. Subsequently, Smith signed a covenant not to compete with Combustion Engineering for three years in exchange for an agreement to cancel payment of the unpaid portion of the $25,000 at the end of the three-year period.

The complaint alleged that the search and seizure conducted at the defendants' instigation violated Smith's Fourth Amendment rights, and sought damages pursuant to 42 U.S.C. §1983. The complaint also sought treble damages under the Sherman Act, alleging that the defendants intended to destroy Western Reserve Group and eliminate it as a competitor for replacement parts by causing the investigation and resulting seizure of its property. It further charged that the defendants conspired with Niam Investigations and the prosecutor's office to bring about the indictment and prosecution of Smith and ultimately to coerce his guilty plea and covenant not to compete, all in violation of the antitrust laws.

II.

The district court granted the defendants' motion to dismiss the civil rights claim, brought pursuant to §1983, on the basis of limitations. The complaint charged that the defendants violated the plaintiffs' civil rights by engaging in "tortious conduct and acts in concert or conspiracy with persons acting under color of state law. . . ." More specifically, the complaint alleged that Kavanagh executed a defective affidavit for a search warrant that resulted in an unreasonable search of

Smith's residence and seizure of property of Smith and Western Reserve Group. The search occurred on December 8, 1981, and the complaint was filed on November 18, 1985.

Applying *Wilson v. Garcia*, 471 U.S. 261 (1985), and *Mulligan v. Hazard*, 777 F.2d 340 (6th Cir. 1985), *cert. denied*, 476 U.S. 1174 (1986), the district court held that the civil rights action was time-barred. In *Wilson v. Garcia*, the Supreme Court directed that all §1983 actions be characterized as personal injury actions for limitations purposes as a matter of federal law. This leaves "[o]nly the length of the limitations period, and closely related questions of tolling and application" to be governed by state law. 471 U.S. at 269 (footnote omitted). In *Mulligan v. Hazard* this court noted that Ohio has two statutes of limitations that arguably might be applied to §1983 actions. There is a two-year statute of limitations for actions to recover for bodily injuries. Ohio Rev. Code §2305.10. There is also a one-year statute that applies to actions for libel, slander, assault, battery, malicious prosecution, false imprisonment and malpractice. Ohio Rev. Code §2305.11. The court then determined that the one-year Ohio limitations period should apply to §1983 actions and that *Wilson v. Garcia* should be applied retroactively. 777 F.2d at 343-44.

Mulligan v. Hazard has been criticized as failing to follow the mandate of *Wilson v. Garcia* by not selecting the Ohio statute of limitations that is specifically applicable to claims based on bodily injury. This court recently granted a petition to rehear en banc a decision in which the panel followed *Mulligan v. Hazard* and applied the Ohio one-year statute of limitations period in a §1983 action. *Browning v. Pendleton*, 6th Cir. No. 86-4123, decided and filed April 8, 1988; order vacating decision and restoring case to docket as a pending appeal, June 20, 1988.

Even if this court should conclude upon rehearing that *Mulligan v. Hazard* was incorrectly decided insofar as it selected Ohio's one-year statute of limitations rather than the two-year statute, such a decision would not benefit the plaintiffs. The plaintiffs waited until nearly four years after their alleged §1983 cause of action accrued before filing their complaint. As the *Mulligan* court pointed out, Ohio's catch-all four-year statute of limitations, Ohio Rev. Code §2305.09(D), does not apply to §1983 actions. 777 F.2d at 343 n. 4.

The plaintiffs also contend that the defendants were guilty of a continuing violation that did not end until January 13, 1984 when the guilty pleas were entered. However, in this argument the plaintiffs confuse a continuing violation with the extended effects of a discrete wrongful act. See *United Air Lines, Inc. v. Evans,* 431 U.S. 553, 558 (1977). The district court did not err in granting the motion to dismiss Count I, the civil rights claim.

III.

Counts II and III separately alleged violations of Sections 1 and 2 of the Sherman Act on behalf of the plaintiffs Western Reserve Group, Inc. and Lester W. Smith respectively. These counts charged the defendants with contracting with Niam Investigations with "a specific intent to acquire monopoly power in restraint of trade and to control price and to foreclose competition in the United States" with respect to replacement parts for equipment and manufactured and sold by the defendants Combustion Engineering, and C-E Cast Equipment. These charges related to the search of Smith's residence and seizure of his and Western Reserve Group's property and subsequent actions of various defendants in connection with the indictment of Smith by the state grand jury.

The district court granted the defendants' motion for summary judgment on Counts II and III after finding that the actions of the defendants upon which the antitrust claims were based are protected by the *Noerr-Pennington* doctrine. This rule of law, explained in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), holds that concerted efforts to influence public officials are shielded from the Sherman Act regardless of intent or purpose. This is true even though these efforts have as their sole purpose the destruction of others as competitors. *Noerr*, 365 U.S. at 138; *Pennington*, 381 U.S. at 670.

In its unpublished opinion,* the district court wrote:

> A review of the record shows that any harm that resulted to plaintiffs as a legitimate competitor at C-E Cast stemmed from the investigation, search and prosecution of plaintiffs. The investigation, search and prosecution was a result of C-E Cast's desire to protect what it, rightly or wrongly, believed to be its own product or trade secret. The *Noerr-Pennington* doctrine immunizes from antitrust liability attempts to influence the legislative process, administrative agencies or the courts. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). Thus, the actions of the related defendants here are precisely those which fall under the *Noerr-Pennington* doctrine. For those reasons, the Court does not believe that questions concerning the legitimacy of plaintiff Western Reserve Group, Inc. as a competitor of C-E Cast and the availability of C-E Cast's drawing raise an issue of material fact. As to plaintiff's claims of conspiracy between the defendants and unnamed co-conspirators, the

* Petitioner's comment: The quote is from opinion authored by the district court and filed January 21, 1987 (Dist. Nv 97), A _____.

plaintiff has alleged no set of facts that would remove the defendants' conduct from the shield of the *Noerr-Pennington* doctrine.

In its most recent decision applying *Noerr-Pennington*, the Supreme Court denied antitrust immunity. See *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, _____ U.S. _____, 108 S. Ct. 1931 (1988). In *Allied Tube* a private, voluntary organization that publishes product standards and fire codes voted at a "packed meeting" to exclude a particular product from a code in response to a conspiracy among manufacturers of a competing product. When sued, one of the conspiring manufacturers claimed antitrust immunity on the theory that the association was "akin to a legislature" and that its activities were "consistent with acceptable standards of political action." *Id.* at 1936. While reaffirming that "[c]oncerted efforts to restrain or monopolize trade by petitioning government officials are protected from antitrust liability" under the *Noerr-Pennington* doctrine, *id.*, the Supreme Court agreed with the court of appeals that the association should not be treated as a " 'quasi-legislative' body." *Id.* at 1937. The Court cautioned that its decision "depends on the context and nature of the activity." *Id.* at 1941 n. 10. *Allied Tube* does not speak to the present case, where the defendants resorted to the courts.

The district court also denied the plaintiffs' contention that the defendants' conduct came within the "sham exception" to the *Noerr-Pennington* doctrine. The district court rejected this argument holding that the defendants could not be found to have fostered a baseless prosecution since they prevailed in their position when the plaintiffs pled guilty. The district court relied principally on *Potters Medical Center v. City Hospital Ass'n*, 800 F.2d 568, 578 (6th Cir. 1986), in which this

court held that a defendant's activities against a competitor could not be considered a sham where the defendant's position prevailed.

In concluding that the defendants' activities in the present case were of the type *Noerr-Pennington* is designed to shield, the district court adopted the following language in *Potters*:

> Without a doubt, the intention to harm a competitor is not sufficient to make litigation or administrative proceedings a sham. The anticompetitive motive is the very matter protected under *Noerr-Pennington*. Rather, the requisite motive for the sham exception is the intent to harm one's competitors not by the result of the litigation but by the simple fact of the institution of litigation."

Potters, 800 F.2d at 579, quoting *MCI Communications Corp. v. American Telephone & Telegraph Co.*, 708 F.2d 1081, 1156 (7th Cir. 1983), *cert. denied* 464 U.S. 891 (1983).

Summary judgment was properly granted on the basis of *Noerr-Pennington*. We have carefully considered all of the plaintiffs' remaining arguments, many relating to procedural matters within the trial court's discretion, and find them to have no merit.

The judgment of the district court is affirmed.

ISSUED AS MANDATE: October 26, 1988
COSTS: Recover by Appellee

FEES:	None
PRINTING:	$540.00
TOTAL:	$540.00

DISTRICT COURT ORDER LIMITING DISCOVERY BY PETITIONERS

(Filed January 3, 1986)

Case No. C85-3451A

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LESTER W. SMITH, *et al.*,
Plaintiffs,

vs.

COMBUSTION ENGINEERING, INC., *et al.*,
Defendants.

ORDER LIMITING DISCOVERY
PURSUANT TO RULE 26(c)

Presently before the court are two motions filed by the Combustion Engineering defendants. One is a motion for summary judgment under Rule 56, on the basis of a prior release of all claims by plaintiffs. The second is a motion to dismiss the First Count for alleged civil rights violations, for the reason that the claim is barred by the applicable statute of limitations.

Plaintiffs have noticed the deposition of Niam Investigations, and the Combustion Engineering defendants have moved that discovery of Niam Investigations not be had until ruling on the motion for summary judgment and the motion to dismiss.

It appearing to the court that good cause has been shown, it is hereby ORDERED that a protective order be entered herein that the scope of discovery be limited to factual issues, if any, related to the Settlement Agreement and Mutual Release and/or the statute of limitations. The (illegible) Depositions (illegible) be subject to the foregoing limitations.

/s/ DAVID D. DOWD, JR.
Judge, United States District Court

DATED this 3rd day of
January, 1985.

DISTRICT COURT MEMORANDUM OPINION

(Filed February 19, 1986)

Case No. C85-3451A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LESTER W. SMITH, *et al.*,
Plaintiffs,

vs.

COMBUSTION ENGINEERING, INC., *et al.*,
Defendants.

MEMORANDUM OPINION

Before the Court are three motions filed by the defendants, Combustion Engineering, C-E Cast Equipment, James F. Calvert, George E. Fisher, Jr., Edwin M. Kavanagh, James B. Kelly, James E. Klima, Thomas E. McGranahan, William F. Roche, and Arthur J. Santry, Jr.[1] The defendants have filed the following motions: a motion to dismiss Count I of the plaintiffs' complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure; a motion for summary judgment as to all counts in the complaint pursuant to Rule 56 of the Federal Rules of Civil Procedure; and a motion for sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure. In support of the motion for summary

[1] Defendant Lawrence K. Hubbel has not filed a motion for summary judgment or a motion to dismiss.

judgment, the defendants have provided the Court with various evidentiary exhibits. Also before the Court is the response of the plaintiffs, Lester W. Smith and Western Reserve Group, to the defendants' motions. For the reasons that follow, the motion to dismiss Count I of the plaintiffs' complaint is granted, and the motion for summary judgment on Counts II and III is denied.

I. BACKGROUND

According to the complaint, plaintiff Smith was a vice-president and general manager of defendant C-E Cast Equipment Company during the years 1970 through 1976. In 1976, Smith left C-E Cast Equipment Co., and in May of 1978 became a shareholder, director, and president of Western Reserve Group, Inc., the other plaintiff in this case. The basis for the plaintiffs' law suit stems from events occurring in 1981. According to the plaintiffs' complaint, defendant Edwin M. Kavanagh discovered that Defiance, Illinois Central Foundry, a customer of C-E Cast Equipment Company, had found a new supplier for parts formerly supplied by C-E Cast Equipment. Kavanagh hired Niam Investigations to investigate the circumstances surrounding the customer's decision to find another supplier. It appears that Niam's investigation implicated Smith and Western Reserve Group. Based on information supplied by Niam and Royalton Manufacturing, Inc., a company that produced parts sold by Western Reserve Group, Kavanagh and defendant Thomas E. McGranahan provided information to the Cuyahoga County Prosecutor's Office regarding alleged criminal activity by Smith and Western Reserve Group. The information supplied by Kavanagh and McGranahan resulted in the issuance of a search warrant authorizing the search of Smith's residence. As a result of the search, certain

property belonging to Smith and Western Reserve Group was confiscated by the Cuyahoga County Sheriff's Department.

On the basis of grand jury testimony provided by Kavanagh and Edward Niam of Niam Investigations, as well as the evidence seized pursuant to the search warrant, a Cuyahoga County Grand Jury indicted Smith for theft or conversion of services, Ohio Revised Code §1331.51; criminal simulation, §2913.32; the felony of receiving stolen property of a value greater than $150.00, §2913.51; and possession of criminal tools, §2923.24. *See* Defendants' Exhibit E. Smith pleaded not guilty to the four counts in the indictment on February 22, 1982 in the Court of Common Pleas, Cuyahoga County. Smith filed motions to suppress evidence and to dismiss the indictment, but before the court ruled on those motions, Smith agreed to accept a plea bargain arrangement offered by the prosecution. The plea bargain arrangement provided that Smith would enter a plea of guilty to the misdemeanor of receiving stolen property of a value less than $150.00, a lesser and included offense in Count III of the indictment, and the prosecutor would dismiss the other counts in the indictment. The plea arrangement further provided that Smith, on behalf of Western Reserve Group, would enter a plea of guilty to a violation of Ohio Revised Code §2913.32.[4] Under the terms of the plea arrangement, Smith's fine and sentence were suspended, and Smith was placed on one-year probation. As a condition of Smith's probation, Smith was required to pay restitution directly to Combustion Engineering in the amount of $25,000.00, with $5,000.00 payable before January 6, 1984, and the remaining

[4] Section 2913.32 is a criminal simulation statute designed to prohibit forgery involving objects rather than writings. It is a fourth degree felony.

$20,000.00 in the form of a promissory note executed by Smith and payable on December 21, 1984. Finally, Western Reserve Group was fined $5,000.00.

As part of the plea bargain arrangement, the parties executed a document titled "Settlement Agreement and Mutual Release." The release purports to discharge Combustion Engineering, C-E Cast Equipment, and Smith "fully and forever . . . from all liability, claims, and causes of action of every kind in any way arising out of the dispute. . . ." The agreement also includes a provision requiring Smith to pay to Combustion Engineering $25,000.00 in a similar manner to that under the terms of the plea arrangement.

Subsequent to the execution of the mutual release, defendant James B. Kelly, acting on behalf of Combustion Engineering, offered to defer Smith's payment on the promissory note in exchange for Smith's agreement to sign a three-year noncompetition covenant. Smith accepted Combustion Engineering's offer and signed a covenant not to complete with Combustion Engineering for three years.

The plaintiffs' complaint first alleges a cause of action under 42 U.S.C. §1983. Smith alleges that the defendants conspired with the county prosecutor and the Sheriff's Department to conduct an illegal search of the plaintiff's residence in violation of the fourth amendment.[5] The plaintiffs request four million dollars in damages plus interest, costs, and attorneys' fees. Count II alleges a violation of §§1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2 (1982), and the antitrust laws of the

[5] The plaintiffs appear to allege a violation of the Ohio Constitution. To the extent the plaintiffs intend in the complaint to allege a violation of the Ohio Constitution, the Court considers it a claim pendent to the §1983 claim, and dismisses it. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

United States, on behalf of plaintiff Western Reserve Group. The plaintiffs allege that the defendants conspired with Niam Investigations with the intent to gain a monopoly and restraint of trade, and to foreclose competition in both the actual and relevant markets. In a nutshell, the plaintiffs contend that the defendants intended to destroy Western Reserve Group as a business entity by causing the investigation, which resulted in the seizure and confiscation of Western Reserve Group property essential to day-to-day business operations. The plaintiffs request six million dollars in damages, trebled, plus interest, costs, and attorneys' fees.

Count II alleges violations of §§1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2 (1982), and the antitrust laws of the United States, on behalf of Lester W. Smith. The plaintiffs contend that the defendants conspired with Niam Investigations and the County Prosecutor's Office with the intent to deprive Smith of the ability to perform "personal services" and to function in the business community. The plaintiffs contend that the indictment of Smith, the prosecution of Smith, the arrangement of the plea bargain, and ultimately the offer by Combustion Engineering to cancel the $20,000.00 debt in exchange for a promise not to compete constitutes a conspiracy in violation of the Sherman Act and the antitrust laws. The plaintiffs request one million dollars in damages, trebled, plus interest, costs, and attorneys' fees.

II. DISCUSSION AND LAW

A. *Defendants' Motion to Dismiss.*

The defendants have moved to dismiss Count I of the plaintiffs' complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The defendants argue

that the plaintiffs' §1983 action is based on a trespass to property in violation of the fourth amendment.[6] The trespass occurred on December 8, 1981, when the Cuyahoga County Sheriff's Department served the search warrant on Smith and Western Reserve Group and searched his home, and seized certain personal property belonging to the plaintiff and Western Reserve Group. Looking only at the pleadings, as is required under Rule 12(b)(6), defendants argue that the plaintiffs' action is barred by the statute of limitations.

In *Wilson v. Garcia*, 105 S. Ct. 1938 (1985), the Supreme Court determined that "section 1983 claims are best characterized as personal injury actions . . ." and held that the state statute of limitations for personal injuries in tort should govern §1983 actions. *Id.* at 1948-49. In concluding that the state personal injury statute of limitations should be applied to §1983 actions, the Court rejected other possibly analogous state limitations statutes, including those controlling breach of contract claims, tort claims for property damage, tort claims based on wrongful acts by public officials, and claims not otherwise accounted for in state statutes (the "catchall" limitations provisions). *Id.*

The Sixth Circuit has further refined the Supreme Court's holding in *Wilson v. Garcia*. In *Mulligan v. Hazard*, 777 F.2d 340 (6th Cir. 1985), the Sixth Circuit was faced with choosing between the two Ohio statutes of limitation applicable to personal injury actions. In selecting between the two-year statute of limitations for bodily injuries, *see* Ohio Rev. Code Ann. §2305.10 (Page Supp. 1984), and the one-year statute of limitations for

[6] The plaintiffs' response brief indicates that they agree that the §1983 claim is based on trespass to property in violation of the fourth amendment.

tort actions based on libel, slander, assault, battery, malicious prosecution, false imprisonment, or malpractice, *see* Ohio Rev. Code Ann. §2305.11 (Page Supp. 1984), the court determined that the one-year statute of limitations is more appropriate for application in §1983 actions. *Id.* at 344. The court reasoned that Congress' chief concern in passing the Civil Rights Act of 1871 was to provide redress for constitutional violations stemming from intentional tortious conduct, and concluded that the one-year statute of limitations, "which applies to actions involving assault, batteries, and the like, more specifically encompasses the sorts of actions which concerned Congress as it enacted the Civil Rights statutes." *Id.* The court thus adopted a one-year statute of limitations for §1983 actions brought in Ohio.

The Sixth Circuit also determined that the holding in *Wilson v. Garcia* should be applied retroactively to cases filed before the date of the decision. The Court analogized the result in *Wilson* to that in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), in which the Supreme Court implicitly applied retroactively its holding on the appropriate statute of limitations in §301 actions. The Sixth Circuit thus held that the *Wilson* case implicitly calls for a retroactive application of its holding. *Mulligan v. Hazard*, 777 F.2d at 344.

The plaintiffs base their §1983 actions on alleged violations of their fourth amendment rights resulting from the search and seizure of Smith and Western Reserve Group's property. The complaint indicates that the allegedly illegal search and seizure occurred on December 8, 1981. Thus under *Mulligan*, to be timely the plaintiffs must have filed their action by December 8, 1982. The case was filed, however, on November 18,

1985, nearly four years after the allegedly illegal conduct. Applying the holding in *Wilson v. Garcia*, as refined by Mulligan, retroactively, the plaintiffs' action is time barred.[7] Accordingly, the Court dismisses Count I of the plaintiffs' complaint.

B. *Defendants' Motion for Summary Judgment.*

The defendants have moved for summary judgment on all counts[8] based on the release granted to defendants Combustion Engineering, C-E Cast Equipment, and their officers and employees by plaintiff Smith and Western Reserve Group, Inc., in conjunction with the plea arrangement entered into on January 13, 1984. In support of their motion, the defendants have provided the Court with the affidavit of Donald L. Southam, the president and general manager of C-E Cast Equipment. In the affidavit, Southam attests to the authenticity of the exhibits appended to the defendants' motion, consisting of a copy of the Settlement Agreement and Mutual Release, a copy of the transcript of proceedings in *Ohio v. Smith*, in which the plaintiff Smith entered their guilty pleas, the copy of the plea agreement between the State of Ohio and plaintiffs Smith and Western Reserve Group, and a copy of the promissory note signed by Lester Smith on January 13, 1984, promising to pay to Combustion Engineering the sum of $20,000.00.

In response, the plaintiffs have filed the affidavit of Lester Smith, in which he verifies the allegations made in the complaint and indicates that after leaving the employ

---

[7] The Court notes that even if Ohio's two-year statute was applicable in this case, the plaintiffs' action is still time barred.

[8] The Court notes that it has already dismissed Count I of the plaintiffs' complaint.

of Combustion Engineering in 1976, he received no money or compensation from Combustion Engineering or C-E Cast Equipment.[9] The Court finds that Smith's affidavit does not create a factual dispute with regard to the legality of the release, and concludes that the plaintiff has failed to demonstrate the existence of genuine issues of material fact.

The Settlement Agreement and Mutual Release, entered into by Lester W. Smith, his heirs, personal representatives, and assigns, and Western Reserve Group, its assigns, officers, agents and employees, and Combustion Engineering, all divisions and subsidiaries, and all officers, agents, and employees, purports to provide that Smith, Western Reserve Group, and Combustion Engineering "fully and forever release[ ] and discharge[ ] [the other party] from all liabilities, claims, and causes of action of every kind in any way arising out of the dispute."[10] The release also provided that Smith pay $25,000.00 to Combustion Engineering.

The Court finds the Settlement Agreement and Mutual Release is not ambiguous on its face and does not raise any problems of interpretation. This particular type of release, however, is not valid in Ohio: "A release, the consideration of which, in whole or in part, is the suppression of criminal prosecution, is void because of a

---

[9] The Court notes that there has been some controversy between the parties as to the production by the defendants of certain documents relating to Niam Investigations. The Court has examined the documents submitted for *in camera* inspection, and concludes they are not pertinent to the issue of whether the release is valid.

[10] The term "dispute," by the terms of the Settlement Agreement and Mutual Release, refers to the operations of Western Reserve Group during the period from April of 1980 to January 13, 1984, as well as the allegations contained in the criminal indictment against Smith and Western Reserve Group.

lack of consideration. (*Insurance Co. v. Hull*, [1894], 51 Ohio St. 270, applied.)" *Brown v. Best Products Co.*, 18 Ohio St. 3d 32, 32, 479 N.E.2d 852, 855 (1985). In *Brown*, the plaintiff's employer pressed charges against the plaintiff for theft in municipal court. Before a decision was reached in the case, the parties informed the prosecutor that an agreement had been reached and the prosecutor moved to dismiss the charges. The plaintiff then signed a release form purporting to release the employer from any civil liability arising out of the criminal charges. The plaintiff subsequently filed a civil suit against the employer alleging various tort claims. The employer-defendant raised the release as a defense to the plaintiff's claims. The trial court found the release void, and the Court of Appeals affirmed. The Ohio Supreme Court affirmed, holding that a release supported to any extent by consideration based on the suppression or dismissal of criminal prosecution is void because "[t]he threat of criminal sanctions places the party releasing in a state of apprehension which interferes with his legal capacity to enter into an agreement . . ." and because there is in actuality no consideration supporting the agreement because "[t]he decision to pursue or drop criminal charges is vested in the state." *Id.* at 34-35, 479 N.E.2d at 855.

The release agreement signed by Smith, Western Reserve Group, and Combustion Engineering was at least partially supported by consideration consisting of the dismissal of the criminal charges. In the transcript of the proceedings at which Smith entered his guilty plea with the common pleas court, pursuant to the plea arrangement, the prosecutor stated: "It is my understanding that both parties have executed and as part of the plea bargaining there was a Settlement

Agreement and Mutual Release signed by the respective parties. . . ." Defendants' Exhibit B at 7-8. By its own terms, the settlement agreement and mutual release resolved the "dispute" that included the criminal charges. The release entered into between Smith, Western Reserve Group, and Combustion Engineering was intimately related to the prosecution of criminal charges against the plaintiffs. As a result, the release is invalid under Ohio law. Accordingly, the defendants' motion for summary judgment is denied.

3. *Defendants' Motion for Sanctions.*

The defendants have also filed a motion for sanctions pursuant to Rule 11. Due to the uncertainty in the law regarding the appropriate statute of limitations in §1983 cases and the retroactive application at the time the plaintiffs filed their lawsuit, the Court denies the defendants' motion for sanctions.

III. CONCLUSION

For the reasons stated above, the Court grants the defendants' motion to dismiss Count I of the plaintiffs' complaint. In addition, the Court denies the defendants' motion for summary judgment with respect to Counts II and III of the plaintiffs' complaint.

IT IS SO ORDERED.

/s/ DAVID D. DOWD, JR.
U. S. District Judge

DISTRICT COURT JUDGMENT ENTRY

(Filed February 19, 1986)

Case No. C85-3451A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LESTER W. SMITH, *et al.*,
Plaintiffs,

vs.

COMBUSTION ENGINEERING, INC., *et al.*,
Defendants.

JUDGMENT ENTRY

For the reasons set forth in the Memorandum Opinion filed contemporaneously with this Judgment Entry, IT IS HEREBY ORDERED, ADJUDGED, and DECREED that the defendants' motion to dismiss Count I of the plaintiffs' complaint is granted. The defendants' motion for summary judgment with respect to Counts II and III of the plaintiffs' complaint is denied.

/s/ DAVID D. DOWD, JR.
U. S. District Judge

DISTRICT COURT ORDER

(Filed July 29, 1986)

Case No. C85-3451A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LESTER W. SMITH, *et al.*,
Plaintiffs,

vs.

COMBUSTION ENGINEERING, INC., *et al.*,
Defendants.

ORDER

Before the Court is the motion of the plaintiffs, Lester W. Smith and Western Reserve Group, Inc., for reconsideration of the Court's memorandum opinion and judgment entry filed February 19, 1986 dismissing Count I of the plaintiffs' complaint. The defendants have responded. For the reasons that follow, the motion is denied.

In their complaint, the plaintiffs have alleged a violation of 42 U.S.C. §1983 and violations of §§1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2 (1982) and the antitrust laws of the United States. The plaintiffs have requested the Court to reconsider its decision dismissing the §1983 claim. In the §1983 claim, the plaintiffs allege that the defendants conspired with the County Prosecutor and the Sheriff's Department to conduct an illegal search of the plaintiff's residence in violation of the fourth amendment.

In the opinion filed on February 19, 1986, the Court dismissed the §1983 claim, holding that it is time barred by the statute of limitations. In *Wilson v. Garcia*, 105 S. Ct. 1938 (1985), the Supreme Court determined that "section 1983 claims are best characterized as personal injury actions . . ." and held that the state statute of limitations for personal injuries in tort should govern §1983 actions. *Id.* at 1948-49. Interpreting *Wilson v. Garcia*, the Sixth Circuit, in *Mulligan v. Hazard*, 777 F.2d 340 (6th Cir. 1985), *cert. denied*, 54 U.S.L.W. 3808 (U.S. June 9, 1986), held that Ohio's one-year statute of limitations for tort actions based on libel, slander, assault, battery, malicious prosecution, false imprisonment, or malpractice is the appropriate limitations period to apply in §1983 actions. *Id.* at 344. The Sixth Circuit also determined that courts should apply the holding in *Wilson v. Garcia* should be applied retroactively to cases filed before the date of that decision. *Id.* This Court observed that the actions forming the basis of the plaintiffs' §1983 claim occurred on December 8, 1981 and that the plaintiffs filed this action nearly four years after the allegedly illegal conduct occurred, and thus held that the plaintiffs' §1983 claim was time barred.

In their motion, the plaintiffs argue that the Sixth Circuit decision in *Mulligan* was wrongly decided, and point to decisions by other circuit courts they claim are better reasoned and comport more closely with the intent of *Wilson v. Garcia*. Notwithstanding contrary decisions in other circuits, the law in the Sixth Circuit, at least for those district courts located within the boundaries of Ohio, is controlled by *Mulligan*. District courts must follow clearly established circuit law. The Sixth Circuit has not reversed *Mulligan*, and the Supreme Court has

denied certiorari in the case. Despite Justice White's dissent from the denial of certiorari, joined by Justice Marshall, *Mulligan* remains good law in the Sixth Circuit.

The plaintiffs further argue that the defendants' actions constitute a continuing violation and that the continuing violation renders the §1983 claim timely. The Court concludes that the actions complained of by the plaintiffs do not constitute a continuing violation. The conduct that forms the basis of the §1983 claim was a discreet incident that occurred on December 8, 1981—the search and seizure of the plaintiffs' property. The effects of that isolated incident do not constitute a continuing violation for the purposes of tolling the running of the statute of limitations.

For the foregoing reasons, the Court declines to reconsider its earlier decision. The plaintiffs' motion is denied. The Court will hold in abeyance the defendants' conditional motion for reconsideration of the Court's February 19, 1986 decision with regard to Counts II and III of the plaintiffs' complaint.

IT IS SO ORDERED.

/s/ DAVID D. DOWD, JR.
U. S. District Judge

DISTRICT COURT MEMORANDUM OPINION

(Filed January 21, 1987)

Case No. C85-3451A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LESTER W. SMITH, *et al.*,
Plaintiffs,

vs.

COMBUSTION ENGINEERING, INC., *et al.*,
Defendants.

MEMORANDUM OPINION

Presently before the Court is the motion of defendants Combustion Engineering, Inc., C-E Cast Equipment, James F. Calvert, George E. Fisher, Jr., Edwin M. Kavanagh, James B. Kelly, James E. Klima, Thomas E. McGronahan, William F. Roche, and Arthur J. Santry, Jr., hereafter referred to as related defendants, for summary judgment on Counts II and III of plaintiff's complaint pursuant to Rule 56 of the Federal Rules of Civil Procedure. The related defendants seek summary judgment in this antitrust action asserting that their conduct, which forms the basis for plaintiffs' Smith and Western Reserve Group, Inc. complaint, is protected under the *Noerr-Pennington* doctrine. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). For the factual

background in this action, see this Court's prior Memorandum Opinion of February 19, 1986 (Docket Entry 52).

As an initial matter, plaintiffs assert that the related defendants waived the defense of the *Noerr-Pennington* doctrine by failing to include it in their motion to dismiss, their answers, or their initial motion for summary judgment. Although Fed. R. Civ. P. 8 requires a defendant to "affirmatively" plead all affirmative defenses, and Fed. R. Civ. P. 12 provides that a party waives all defenses not raised in a motion to dismiss, exceptions to these rules exist. One exception is that a party may only waive an affirmative defense by express waiver.[1] *See Lesher v. Laurich*, 784 F.2d 193, 195 (6th Cir. 1986). Additionally, the rules relating to amendment of pleadings are designed to allow for liberal amendment. *See Bodenhamer Bldg. Corp. v. Architectural Research Corp.*, 106 F.R.D. 521 (E.D. Mich. 1985). Although the related defendants here have not sought leave to amend their answer, no express waiver of the affirmative defense under the *Noerr-Pennington* doctrine has been made. Thus, the Court does not consider the defense waived.

This is not to say that the Court condones the failure to plead or assert the defense at an earlier time. Indeed, had the related defendants raised the issue earlier, it could have been considered with their previous motion and thus saved the Court the expense of reviewing the record an additional time at this later date.

---

[1] Invocation of the *Noerr-Pennington* doctrine has been characterized as an affirmative defense. *See Hospital Bldg. Co. v. Trustees of Rex Hospital*, 791 F.2d 288, 292 (4th Cir. 1986); *In Re Wheel Rail Freight Rate Antitrust Litigation*, 759 F.2d 1305, 1309 n.3 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 2275 (1986).

In response to the motion of the related defendants for summary judgment, the plaintiffs assert that material issues of fact exist as to the relevant product market, the legitimacy of plaintiff Western Reserve Group, Inc., as a competitor of C-E Cast Equipment, the availiability of C-E Cast detailed drawings, the extent of the conspiracy between defendants and unnamed co-conspiractors; alleged abuse of process by the defendants, and the applicability of the sham exception to the *Noerr-Pennington* doctrine.

Summary Judgment is appropriate only where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits. . . .show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56. In ruling on a motion for summary judgment, the Court must view the facts as alleged in the light most favorable to the party opposing the motion. *United States v. Diebold*, 365 U.S. 654, 655 (1962). The Court may not decide factual issues in dispute and must deny the motion for summary judgment if material issues of fact are in dispute.

Concerning plaintiffs' allegations as to the relevant product market, the plaintiffs assert that the relevant product market in dispute is the market for "replacement," "wear," or "spare" parts. The related defendants submit that the relevant market is the market for "make" parts. The related defendants define "make" parts as those parts which can only be made with their detailed specifications. These defendants assert that the specifications of make parts are not available to the public and are only given to their customers in exigent circumstances. Even assuming that the relevant product market is the replacement parts market and that Western Reserve Group, Inc., is a legitimate competitor of defendant C-E Cast, the Court

finds that no *material* issue of fact exists concerning the application of the product market here to the defendants' defense under the *Noerr-Pennington* doctrine.

A review of the record shows that any harm that resulted to plaintiffs as a legitimate competitor at C-E Cast stemmed from the investigation, search and prosecution of plaintiffs. The investigation, search and prosecution was a result of C-E Cast's desire to protect what it, rightly or wrongly, believed to be its own product or trade secret. The *Noerr-Pennington* doctrine immunizes from antitrust liability attempts to influence the legislative process, administrative agencies or the courts. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). Thus, the actions of the related defendants here are precisely those which fall under the *Noerr-Pennington* doctrine. For those reasons, the Court does not believe that questions concerning the legitimacy of defendant Western Reserve Group, Inc. as a competitor of C-E Cast and the availability of C-E Cast's drawing raise an issue of material fact. As to plaintiff's claims of conspiracy between the defendants and unnamed co-conspirators, the plaintiff has alleged no set of facts that would remove the defendants' conduct from the shield of the *Noerr-Pennington* doctrine.

Plaintiffs' claim of abuse of process and the application of the sham exception to the *Noerr-Pennington* doctrine raises more difficult questions. Although normally such issues could only be resolved at trial, the Court feels that in the context of the unique factual background of this case, these questions do not raise an issue of material fact. As noted in this Court's previous opinion, plaintiffs plead guilty to criminal charges arising out of the prosecution in the Cuyahoga County, Ohio, Court of Common Pleas. Thus, plaintiffs' allegations that defendants' investigation and prosecution constituted a "sham" cannot withstand

scrutiny by the "very fact that [the position of the related defendants'] prevailed." *Potters Medical Center v. City Hospital Ass'n.*, 800 F.2d 568, 578 (6th Cir. 1986) and cases cited therein. For these same reasons, plaintiffs' claims of abuse of process must fail. The conduct of the related defendants did not constitute a "baseless" decision to prosecute. *California Motor Transport, supra.*

> Without a doubt, the intention to harm a competitor is not sufficient to make litigation or administrative proceedings a sham. The anticompetitive motive is the very matter protected under *Noerr-Pennington.* Rather, the requisite motive for the sham exception is the intent to harm one's competitors not by the result of the litigation but by the simple fact of the institution of litigation."

Potters, 800 F.2d at 579, quoting *MCI Communications Corp. v. American Telephone & Telegraph Co.,* 708 F.2d 1081, 1156 (7th Cir. 1983), *cert. denied* 464 U.S. 891 (1983). Here the related defendants pursued their prosecution until the plaintiffs had plead guilty to the criminal charges and until the parties had agreed on other additional terms. Such facts do not reasonably support the conclusion that the defendants sought to harm the plaintiffs by the mere "institution of litigation."

The Court believes that there are no material issues of fact in dispute and that the related defendants are entitled to judgment as a matter of law. Therefore, it is ordered that the motion of the related defendants for summary judgment is granted.

IT IS SO ORDERED.

/s/ DAVID D. DOWD, JR.
U. S. District Judge

DISTRICT COURT JUDGMENT ENTRY

(Filed January 21, 1987)

Case No. C85-3451A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LESTER W. SMITH, *et al.*,
Plaintiffs,

vs.

COMBUSTION ENGINEERING, INC., *et al.*,
Defendants.

JUDGMENT ENTRY

For the reasons set forth in the Memorandum Opinion filed contemporaneously with this Judgment Entry, IT IS HEREBY ORDERED, ADJUDGED, and DECREED that the Court grants summary judgment as to Counts II and III of plaintiff's complaint in favor of defendants Combustion Engineering, Inc., C-E Cast Equipment, James F. Calvert, George E. Fisher, Jr., Edwin M. Kavanagh, James B. Kelly, James E. Klima, Thomas E. McGronahan, William F. Rouche, and Arthur J. Santry, Jr., against the plaintiffs, Lester W. Smith and Western Reserve Group, Inc. and finds, pursuant to the provisions of Civil Rule 54(B) that there is no just reason for delay in that this judgment concludes the plaintiffs' case against ten of the eleven defendants in that summary judgment as to Count I of the plaintiffs' complaint was previously granted to the said ten defendants by the Court's order of February 18, 1986.

/s/ DAVID D. DOWD, JR.
U. S. District Judge

DISTRICT COURT MEMORANDUM OPINION

(Filed March 24, 1987)

Case No. C85-3451A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LESTER W. SMITH, *et al.*,
Plaintiffs,

vs.

COMBUSTION ENGINEERING, INC., *et al.*,
Defendants.

MEMORANDUM OPINION

Before the Court is a motion for summary judgment (docket #99), filed January 22, 1987 by Lawrence K. Hubbel, the only remaining defendant in this case, the Court having entered summary judgment in favor of the other ten defendants. The defendant Hubbel moves for summary judgment only as to Count I of the plaintiffs' complaint. Count I alleges a cause of action under 42 U.S.C. §1983. Counts II and III allege antitrust law violations against all the defendants, including the defendant Hubbel. The defendant Hubbel has not moved for summary judgment as to Counts II and III.

Defendant Hubbel's motion for summary judgment on the §1983 count is premised upon the bar of the appropriate statute of limitations. As the Court has earlier noted in this case, the Sixth Circuit Court of

Appeals has adopted a one-year statute of limitations for §1983 actions brought in Ohio. *Mulligan v. Hazard,* 777 F.2d 340 (6th Cir. 1985). In plaintiffs' response to defendant Hubbel's motion for summary judgment (docket #101), plaintiffs have conceded that the latest possible determinative date for statute of limitations purposes is January 13, 1984. *See* plaintiffs' response at pp. 4-5. Plaintiffs did not file their complaint until November 18, 1985, some 22 months later. Accordingly, the Court concludes that the plaintiffs' §1983 claims against the defendant Hubbel are barred by the one-year statute of limitations. The Court therefore sustains the motion for summary judgment as to Count I (docket #99).

IT IS SO ORDERED.

/s/ DAVID D. DOWD, JR.
U. S. District Judge

DISTRICT COURT JUDGMENT ENTRY

(Filed March 24, 1987)

Case No. C85-3451A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LESTER W. SMITH, *et al.*,
Plaintiffs,

vs.

COMBUSTION ENGINEERING, INC., *et al.*,
Defendants.

JUDGMENT ENTRY

For the reasons set forth in the Memorandum Opinion filed contemporaneously with this Judgment Entry, IT IS HEREBY ORDERED, ADJUDGED, and DECREED that summary judgment is entered in favor of the defendant, Lawrence K. Hubbel, on Count I of the plaintiffs' complaint alleging a cause of action under 42 U.S.C. §1983.

/s/ DAVID D. DOWD, JR.
U. S. District Judge

A35

DISTRICT COURT ORDER

(Filed March 24, 1987)

Case No. C85-3451A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LESTER W. SMITH, *et al.*,
Plaintiffs,

vs.

COMBUSTION ENGINEERING, INC., *et al.*,
Defendants.

ORDER

Before the Court is the plaintiffs' request for reconsideration of the Memorandum Opinion and Judgment Entry (1-21-87) dismissing second and third counts (antitrust) (docket #100). On February 12, 1987, a response was filed on behalf of the defendants Combustion Engineering, Inc., its division C-E Cast Equipment, James F. Calvert, George E. Fisher, Jr., Edwin M. Kavanagh, James B. Kelly, James E. Klima, Thomas E. McGranahan, William F. Roche, and Arthur J. Santry, Jr. (the Combustion Engineering defendants). In further support of their request, the plaintiffs mailed a letter to the Court on March 1, 1987 which the Court filed and docketed on March 2, 1987 (docket #103). Finally, the Court has before it a responsive letter from Walter A. Bates, counsel for the Combustion Engineering defendants, dated March 12, 1987 (docket #104).

In the Memorandum Opinion that is the subject of the present request for reconsideration, the Court expressed its view that the "*Noerr-Pennington* doctrine" immunized the defendants' alleged conduct from antitrust scrutiny. *See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). The doctrine generally insulates from antitrust scrutiny the use of the court processes. The Court in that memorandum opinion also rejected the plaintiffs' argument that the "sham exception" to the *Noerr-Pennington* doctrine applied in this case. The sham exception to *Noerr-Pennington* is triggered by conduct amounting to malicious prosecution and/or abuse of process. In its earlier memorandum opinion, the Court reasoned that since the plaintiffs had pled guilty to lesser offenses in order to end the prosecution which was brought by the state of Ohio, the prosecution could not be said to be a sham.[1]

In requesting reconsideration, plaintiffs argue that their guilty pleas were coerced by such factors as the length of the prosecution, financial hardship, and humiliation and embarrassment. As the Court interprets it, plaintiffs' position seems to be that the Court should not have treated the guilty pleas as valid since they were allegedly coerced in one way or another.

The Court concludes that plaintiffs are essentially asking the Court to set aside their guilty pleas, something which the Court has no power to do. The plaintiffs instead must pursue such relief through post-conviction procedures in the state court system. Since

[1] The Court also notes that plaintiffs in the earlier state proceeding were indicted by a grand jury of their peers, and were represented by counsel throughout the criminal proceedings.

plaintiffs have not chosen that route, this Court will consider the guilty pleas to be valid. The plaintiffs' request for reconsideration is denied.

In conclusion, the request for reconsideration of the memorandum opinion and judgment entry (1-21-87) dismissing second and third counts (antitrust) (docket #100) is denied.

IT IS SO ORDERED.

/s/ DAVID D. DOWD, JR.
U. S. District Judge

DISTRICT COURT ORDER

(Filed March 24, 1987)

Case No. C85-3451A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LESTER SMITH, *et al.*,
Plaintiffs,

vs.

COMBUSTION ENGINEERING, INC., *et al.*,
Defendants.

ORDER

In light of the fact that the Court has granted summary judgment to all defendants on the plaintiffs' claims under 42 U.S.C. §1983, and in light of the fact that the Court has granted summary judgment on Counts II and III of the complaint in favor of all defendants except for Lawrence K. Hubbel and has denied the plaintiffs' request for reconsideration of that decision, plaintiffs are hereby given leave until April 20, 1987 to file a brief and any appropriate supporting papers showing why the Court should not also grant summary judgment in favor of the defendant Lawrence K. Hubbel on Counts II and III of plaintiffs' complaint. *See Kistner v. Califano,* 579 F.2d 1004, 1006 (6th Cir. 1978). The defendant Hubbel shall then have until April 27, 1987 to file a response if he chooses to do so.

IT IS SO ORDERED.

/s/ DAVID D. DOWD, JR.
U. S. District Judge

DISTRICT COURT MEMORANDUM OPINION

(Filed June 10, 1987)

Case No. C85-3451A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LESTER W. SMITH, *et al.*,
Plaintiffs,

vs.

COMBUSTION ENGINEERING, INC., *et al.*,
Defendants.

MEMORANDUM OPINION

On January 21, 1987 the Court granted summary judgment to the ten related defendants[1] on the antitrust counts (counts II and III) of the plaintiffs' complaint, on the basis of the *Noerr-Pennington* doctrine. *See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). On March 24, 1987 the Court denied the plaintiffs' motion for reconsideration of the January 21, 1987 ruling, and the Court also gave plaintiffs leave to file a brief and supporting papers showing why the Court should not also grant summary judgment in favor of the only remaining defendant in

[1] The "related defendants" are Combustion Engineering, Inc., C-E Cast Equipment, James F. Calvert, George E. Fisher, Jr., Edwin M. Kavanagh, James B. Kelly, James E. Klima, Thomas E. McGronahan, William F. Roche, and Arthur J. Santry, Jr.

this case, Lawrence K. Hubbel, on counts II and III of the plaintiffs' complaint. The defendant Hubbel has not himself filed a motion for summary judgment as to Counts II and III.

Presently before the Court is the plaintiffs' response to the Court's order of March 24, 1987.[2] Having considered the plaintiffs' response and supporting materials, the Court concludes that summary judgment is warranted in favor of the defendant Hubbel on counts II and III of the plaintiffs' complaint.

At page 37 and 38 of the plaintiffs' response, the plaintiffs state as follows:

> The genuine issue of material fact with respect to defendant Hubbel (and the other 10 related defendants) is whether he conspired with others for the purpose of eliminating Western Reserve Group, Inc., and Lester W. Smith as competitors of Combustion Engineering. It is undisputed and supported by evidence the defendant Hubbel conspired, and indeed, had a cooperative relationship with Kavanagh. The purpose, reason, motive, or justification of the activities between Kavanagh, Niam and Hubbel is a question of fact.
>
> If the activities were for an improper purpose, as plaintiffs allege, the *Noerr-Pennington* immunity is not available to any of the defendants.

---

[2] Although given leave to do so, and although the Court further granted him an extension of time in which to do so, the defendant Hubbel has not filed anything with the Court by way of a response to the plaintiffs' response to the Court's order. Although it happens that the plaintiffs have not altered the Court's view that summary judgment on the antitrust counts is warranted in favor of the defendant Hubbel, the Court does not look with favor upon the defendant Hubbel's failure to assist the Court, especially in light of the fact that the defendant Hubbel requested and was granted an extension of time in which to file appropriate papers.

It appears to the Court that the plaintiffs present the same argument on behalf of the defendant Hubbel as they presented earlier on behalf of the other ten defendants. Accordingly, the Court holds to its view that the *Noerr-Pennington* doctrine applies to bar the antitrust counts against the defendant Hubbel.

Although defendant Hubbel has not filed a motion, the Court has determined to enter summary judgment *sua sponte,* having now given the plaintiffs notice of its intent to do so and an opportunity to respond. *See Kistner v. Califano,* 579 F.2d 1004, 1006 (6th Cir. 1978). *See also Celotex Corp. v. Catrett,* 106 S. Ct. 2548, 2554 (1986), where the Supreme Court of the United States noted "that district courts are widely acknowledged to possess the power to enter summary judgments *sua sponte,* so long as the losing party was on notice that she had to come forward with all of her evidence" (citations omitted).

For the foregoing reasons, the Court entered summary judgment in favor of the defendant Lawrence K. Hubbel on count II and count III of the plaintiffs' complaint.

IT IS SO ORDERED.

/s/ DAVID D. DOWD, JR.
U. S. District Judge

DISTRICT COURT JUDGMENT ENTRY

(Filed June 10, 1987)

Case No. C85-3451A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LESTER W. SMITH, *et al.*,
Plaintiffs,

vs.

COMBUSTION ENGINEERING, INC., *et al.*,
Defendants.

JUDGMENT ENTRY

For the reasons set forth in the Memorandum Opinion filed contemporaneously with this Judgment Entry, IT IS HEREBY ORDERED, ADJUDGED, and DECREED that summary judgment is entered in favor of the defendant Lawrence K. Hubbel on count II and count III of the plaintiffs' complaint.

/s/ DAVID D. DOWD, JR.
U. S. District Judge

DISTRICT COURT ORDER

(Filed July 24, 1987)

Case No. C85-3451A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LESTER W. SMITH, *et al.*,
Plaintiffs,

vs.

COMBUSTION ENGINEERING, INC., *et al.*,
Defendants.

ORDER

Before the Court is a pleading styled "combined motions for (i) FRAP 4(a)(5) extension of time and (ii) FRCP 60(b) relief from judgment," filed by the plaintiffs in the above-captioned case. The Combustion Engineering defendants have filed a response to the motions. For the reasons that follow, the Court overrules the plaintiffs' combined motions.

The plaintiffs' motion for an extension of time for filing a notice of appeal is overruled as moot because the plaintiffs have since proceeded to file their notice of appeal.

In the Rule 60(b) motion, the plaintiffs seek relief from the Court's entry of summary judgment for the defendant Hubbel on June 10, 1987, on the plaintiffs' antitrust claims. The plaintiffs do not address their

motion to a similar court ruling concerning the ten Combustion Engineering defendants, which ruling was already on appeal when the plaintiffs filed the present motion. Although the defendant Hubbel has not responded to the motion, the Combustion Engineering defendants have filed a response upon leave of Court.

In support of their Rule 60(b) motion, the plaintiffs attach what appears to be a copy of a judgment of expungement of conviction dated May 18, 1987. Plaintiffs advance the theory that the expungement undercuts the Court's reasoning that the plaintiffs' antitrust claims are barred by the *Noerr-Pennington* doctrine. The Court disagrees. First, as the Combustion Engineering defendants point out, only the conviction of Lester Smith, and not the conviction of the plaintiff Western Reserve Group, was expunged. Secondly, while Ohio Rev. Code §2953.32(C)(2) provides that an expunged conviction will "be deemed not to have occurred," the Court agrees with the Combustion Engineering defendants that the plaintiffs are attempting here to use the expungement in a manner contrary to the statutory purpose of the expungement procedure. The Court agrees with the following reasoning presented by the Combustion Engineering defendants at page 7 of their response to the plaintiffs' motions:

> Plaintiffs' attempt to use the expungement of Lester Smith's conviction in this manner is completely contrary to the purposes of the expungement statute. The Ohio General Assembly enacted that legislation to permit a rehabilitated first-time offender to clear his record after he has paid his debt to society. Section 2953.32 was not intended to be used by an offender as a sword to retaliate against the individuals who brought him to justice.

In conclusion, for the reasons stated above, the plaintiffs' combined motions for (i) FRAP 4(a)(5) extension of time and (ii) FRCP 60(b) relief from judgment (docket #120) are overruled.

IT IS SO ORDERED.

/s/ DAVID D. DOWD, JR.
U. S. District Judge

ORDER OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING

(Filed October 12, 1988)

No. 87-3378/3657

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LESTER W. SMITH, *et al.*,
Plaintiffs-Appellants,

vs.

COMBUSTION ENGINEERING, INC., *et al.*,
Defendants (87-3657),

LAWRENCE K. HUBEEL,
Defendant-Appellee (87-3657),

COMBUSTION ENGINEERING, INC., *et al.*,
Defendants-Appellees (87-3378).

ORDER

BEFORE: LIVELY, MERRITT and KRUPANSKY, *Circuit Judges.*

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petitition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF
THE COURT

/s/ LEONARD GREEN, *Clerk*

ORDER OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT CONSOLIDATING APPEALS NOS. 87-3378, 87-3657 and 87-3761

(Filed November 9, 1987)

Nos. 87- 3378
87-3657
87-3761

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LESTER W. SMITH, *et al.*,
Plaintiffs-Appellants,

vs.

COMBUSTION ENGINEERING, INC., *et al.*,
Defendants-Appellees (87-3378/87-3761)
Defendants (87-3657),

LAWRENCE K. HUBBEL,
Defendant-Appellee.

ORDER

Upon consideration of the appellee, Lawrence K. Hubbel's motion to consolidate the above-styled cases for submission, and to adopt the appellees' brief for case numbered 87-3657,

IT IS ORDERED that the motion to consolidate be, and it hereby is, GRANTED. Hubbel may adopt appellees' briefs filed in the consolidated cases.

ENTERED PURSUANT TO RULE 8(b)
SIXTH CIRCUIT RULES

JOHN P. HEHMAN, *Clerk*
/s/ JOHN P. HEHMAN

ORDER OF THE COURT OF APPEALS OF THE SIXTH CIRCUIT DISMISSING APPEAL NO. 87-3761

(Filed April 11, 1988)

87-3378; 87-3657; 87-3761

[NOT RECOMMENDED FOR FULL-TEXT PUBLICATION]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LESTER W. SMITH,
WESTERN RESERVE GROUP, INC.,
Plaintiffs-Appellants,

vs.

COMBUSTION ENGINEERING, INC., *et al.*,
Defendants-Appellees.

ORDER

Before: KEITH and NORRIS, *Circuit Judges;* and EDWARDS, *Senior Circuit Judge.*

The plaintiffs have filed a total of three notices of appeal in this civil rights and antitrust action. These appeals were consolidated by this Court by order dated November 9, 1987. Ten of the eleven named defendants now move to dismiss appeal No. 87-3761 as to those ten defendants, or in the alternative, to dismiss appeal No. 87-3761 *in toto* for lack of appellate jurisdiction. The plaintiffs oppose the motion.

The plaintiffs' complaint alleged claims against each of eleven named defendants and three unnamed defendants under 42 U.S.C. §1983 and 15 U.S.C. §§1, 2. Ten of the named defendants are Combustion Engineering, Inc., C-E Equipment (a division of Combustion Engineering), and eight past or present officers or employees of those corporations. The claims against the Combustion Engineering defendants have been adjudicated jointly throughout this litigation. The claims against the remaining named defendant, Lawrence K. Hubbel, have been adjudicated separately.

The plaintiffs instituted this action on November 18, 1985. Judgment was entered for the Combustion Engineering defendants by orders dated February 19, 1986 and March 24, 1986. The March 24 order disposed of all counts alleged against the Combustion Engineering defendants and was certified for interlocutory appeal pursuant to Rule 54(b), Federal Rules of Civil Procedure. The plaintiffs' motion for reconsideration was denied on March 24, 1987 and plaintiffs filed a timely notice of appeal which has been docketed as No. 87-3378.

Summary judgment was entered for defendant Hubbel on the civil rights counts on March 24, 1987 and on the antitrust counts on June 10, 1987. The plaintiffs filed motions to extend the time for appeal pursuant to Rule 4(a)(5), Federal Rules of Appellate Procedure, and for relief from judgment pursuant to Rule 60(b), Federal Rules of Civil Procedure. Prior to the district court's disposition of these motions, plaintiffs filed a notice of appeal which has been docketed as No. 87-3657. Thereafter, on July 24, 1987, the district court entered an order overruling plaintiffs' 4(a)(5) motion as moot and overruling the 60(b) motion on the merits. The plaintiffs filed a notice of appeal from that order on August 5,

1987. This appeal has been docketed as No. 87-3761. The Combustion Engineering defendants now move to dismiss appeal No. 87-3761.

The filing of a notice of appeal divests the district court of jurisdiction and transfers jurisdiction to the court of appeals, *S & E Shipping Corp. v. Chesapeake & Ohio Ry. Co.*, 678 F.2d 636, 641 n.10 (6th Cir. 1982); *Cochran v. Birkel*, 651 F.2d 1219, 1221 (6th Cir. 1981); *First Nat'l Bank of Salem, Ohio v. Hirsch*, 535 F.2d 343 (6th Cir. 1976) (per curiam). The district court retains jurisdiction only to proceed with matters that are in aid of the appeal. *Cochran v. Birkel*, 651 F.2d at 1221-23 (where appeal is taken from a clearly nonappealable order); *Jago v. United States District Court*, 570 F.2d 618, 619-22 (6th Cir. 1978); *S & E Shipping Corp. v. Chesapeake & Ohio Ry. Co.*, 678 F.2d at 641, n.10. Once jurisdiction has transferred to the appellate court, if the district judge is disposed to grant a 60(b) motion that has been filed with the district court, he may enter an order so certifying. The party may then file with this Court a motion to remand. *First Nat'l Bank of Salem, Ohio v. Hirsch*, 535 F.2d at 345-46. Absent remand by the appellate court, a district court is without jurisdiction and may not decide a 60(b) motion after the notice of appeal has been filed. *S & E Shipping*, 67 F.2d at 641-42, n.10; *Gould v. Mutual Insurance Co.*, 790 F.2d 769 (9th Cir. 1986), *cert. denied*, 107 S.Ct. 580 (1986).

In the present case, the order of June 10, 1987 adjudicated all matters alleged in the plaintiffs' complaint. The timely notice of appeal filed on July 8, 1987, divested the district court of jurisdiction in this case. As the district court did not certify an intent to grant plaintiffs' 60(b) motion under *Hirsch*, jurisdiction has remained with this Court since the filing of the

second notice of appeal and the district court was without jurisdiction to enter the orders appealed from in appeal III. Accordingly,

It is ORDERED that appeal No. 87-3761 is dismissed for lack of appellate jurisdiction.

ENTERED BY ORDER OF
THE COURT
/s/ JOHN P. HEHMAN, *Clerk*

CALENDAR COORDINATOR, COURT OF APPEALS FOR THE SIXTH CIRCUIT, LETTER DATED MAY 26, 1988, SETTING ORAL ARGUMENT FOR APPEALS NOS. 87-3378 AND 87-3657 WITH LEAVE TO FILE UPDATE CITATIONS

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
U.S. Post Office & Courthouse Building
Cincinnati, Ohio 45202-3988

JOHN P. HEHMAN
CLERK

Telephone
(513) 684-2953
FTS 684-2953

LEONARD GREEN
CHIEF DEPUTY

IMPORTANT NOTICE

May 26, 1988

Mr. Mack D. Cook, II
Ms. Edna R. Hazelett-Cook

Mr. Walter A. Bates

Re: Case No. 87-3378/3657
Lester W. Smith, et al. v. Combustion Engineering, Inc., et al.

This is notice that this case is scheduled to be argued on **Friday, July 29, 1988** in Cincinnati. You should report to room 524, U.S. Post Office Building, 5th and Walnut Streets, no later than **8:30 a.m.** Court will convene at **9:00 a.m.**, Eastern Daylight Saving Time. Oral argument will be limited to 15 minutes per side.

Please complete the following immediately:

(1) Return our enclosed self-addressed postcard indicating the name of counsel who will present oral argument. Only one counsel per side is

ordinarily permitted to argue. In criminal cases, one counsel for each defendant may argue but counsel must divide the time for their side. In civil cases, where the parties on one side are adverse, more than one counsel may argue but the time per side must be divided.

(2) If this is a civil case you may submit to us within the next seven days a list of citations updating your briefs (original and three copies). Each citation should include a one-line statement of the subject matter of the case and a reference to the issue number to which the citation relates.

(3) Inform us if you have knowledge of the same or similar issues before the court in any other pending cases.

Very truly yours,

/s/ MARJORIE I. ELIASEN
Marjorie Eliasen
Calendar Coordinator

sdl

Enclosure

pc: Mr. William A. Hamann, Jr.
Mr. James J. Dyson

ORDER OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING REQUEST FOR ADDITIONAL TIME FOR ORAL ARGUMENT OF APPEALS NOS. 87-3378 and 87-3657

(Filed June 9, 1988)

Nos. 87-3378
87-3657

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LESTER W. SMITH, *et al.*,
Plaintiffs-Appellants,

vs.

COMBUSTION ENGINEERING, INC., *et al.*,
Defendants-Appellees.

ORDER

Upon consideration of the plaintiffs-appellants' letter requesting additional time for oral argument, and the defendants-appellees' response in opposition thereto,

IT IS ORDERED that the request be, and it hereby is, DENIED.

ENTERED BY ORDER
OF THE COURT

JOHN P. HEHMAN, Clerk
/s/ JOHN P. HEHMAN

ORDER OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed July 27, 1988)

Nos. 87-3378
87-3657

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LESTER W. SMITH, *et al.*,
Plaintiffs-Appellants,

vs.

COMBUSTION ENGINEERING, INC., *et al.*,
Defendants-Appellees (88-3378),
Defendants (88-3657),

LAWRENCE K. HUBBEL,
Defendant-Appellee (87-3657).

ORDER

Upon consideration of the appellants' motion to submit for filing additional citations construed as a supplemental brief,

IT IS ORDERED that the motion be, and it hereby is, DENIED, and appellants' additional citations may be filed, but not as a supplemental brief.

ENTERED BY ORDER
OF THE COURT

LEONARD GREEN, Clerk
/s/ LEONARD L. GREEN/LW

PETITIONERS' STATEMENT OF ISSUES PRESENTED FOR REVIEW, COURT OF APPEALS FOR THE SIXTH CIRCUIT, APPEAL NO. 87-3378

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. WHETHER THE DISTRICT COURT ERRED IN GRANTING NOERR-PENNINGTON IMMUNITY FOR ALL ANTITRUST VIOLATIONS CLAIMED IN COUNTS II AND III AND IN FAILING TO CONSIDER FACTS RELEVANT TO THE SHAM EXCEPTION UNDER THE NOERR-PENNINGTON DOCTRINE FOR ONE VIOLATION.

II. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN GRANTING SUMMARY JUDGMENT ON THE BASIS OF AN AFFIRMATIVE DEFENSE THAT WAS WAIVED.

III. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION BY ENTERING A SUA SPONTE MOTION FOR SUMMARY JUDGMENT.

IV. WHETHER THE DISTRICT COURT WAS COMPELLED TO DISMISS SECTION 1983 COUNT I OF THE COMPLAINT BECAUSE OF A TIME BAR.

PETITIONERS' STATEMENT OF ISSUES PRESENTED FOR REVIEW, COURT OF APPEALS FOR THE SIXTH CIRCUIT, APPEAL NO. 87-3657

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. WHETHER DEFENDANT HUBBELL, RUNNING A MACHINE SHOP BUSINESS, MAY BE FOREVER IMMUNIZED BY THE DISTRICT COURT FOR ANTITRUST LIABILITY BY A RULE 56 SUMMARY JUDGMENT.

II. WHETHER A RESPONSE ORDERED BY THE DISTRICT COURT ENABLED PLAINTIFFS TO MAKE A SUFFICIENT FACTUAL SHOWING OF THE EXISTENCE OF ESSENTIAL ELEMENTS IN EACH OF THEIR ANTITRUST CLAIMS AGAINST DEFENDANT HUBBELL TO GAIN A TRIAL ON THE MERITS.

III. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION BY ENTERING SUA SPONTE A MOTION FOR SUMMARY JUDGMENT.

STATE COURT JUDGMENT OF EXPUNGEMENT

(Dated May 18, 1987)

Case No. CR-171358

IN THE COURT OF COMMON PLEAS
CUYHOGA COUNTY, OHIO

STATE OF OHIO,
Plaintiff,

vs.

LESTER W. SMITH,
Defendant.

JOURNAL ENTRY

JUDGMENT OF EXPUNGEMENT OF CONVICTION

ORDER TO SEAL RECORDS

This matter came on to be heard upon the Application for Expungement of the applicant's conviction.

The Court has given notice to the Prosecutor for the case and the Probation Department and a report has been received from the Probation Department as to the defendant.

The Court has considered the evidence and the reasons against granting the application specified in the objection, if any, filed by the Prosecutor.

The Court determines that the applicant's conviction was not one for which the applicant was not eligible for probation, nor a conviction under Chapter 4507 of the

Ohio Revised Code, and that the applicant was in fact eligible for probation; that the applicant is a first offender and that three years have expired after the applicant's final discharge if the applicant was convicted of a felony or that one year has expired after the applicant's final discharge if the applicant was conficted of a misdemeanor; that no criminal proceedings are pending against the applicant; that the applicant's rehabilitation has been attained to the satisfaction of the Court; that the interests of the applicant in having the records pertaining to the applicant's conviction sealed are not outweighed by any legitimate needs of the government to maintain those records; and that the applicant, unless indigent, has paid a fifty dollar ($50.00) filing fee.

THEREFORE, IT IS HEREBY ORDERED that all official records pertaining to this case shall be sealed, that, except as provided in Ohio Revised Code Section 2953.32(F), all index references to this case shall be deleted, that the proceedings in this case shall be deemed not to have occurred, and that the applicant's conviction shall be sealed, except that upon conviction of a subsequent offense, the sealed record of prior conviction may be considered by the Court in determining the sentence or other appropriate disposition, including the relief provided for in Section 2953.31 to 2953.32 of the Revised Code.

IT IS FURTHER ORDERED that the applicant be and is hereby restored to all rights and privileges not otherwise restored by termination of sentence or probation or by final release on parole.

IT IS FURTHER ORDERED that the Clerk of Court of Common Pleas shall serve certified copies of this Journal Entry by certified mail, return receipt requested upon the following:

(1) The law enforcement official in charge of the law enforcement agency or organization which caused the applicant's arrest, applicant to submit to the Clerk of Court of Common Pleas in writing the name and address of said agency or organization, together with applicant's birth date and Social Security Number;

(2) The Prosecuting Attorney of Cuyahoga County, Ohio;

(3) The Adult Probation Department of this Court;

(4) The Bureau of Criminal Investigation in the office of the Attorney General of the State of Ohio, applicant to submit to the Clerk of Court of Common Pleas in writing applicant's birth date and Social Security Number;

(5) The Cuyahoga Regional Information System (CRIS);

(6) The Cuyahoga County Data Center; and

(7) The Cuyahoga County Sheriff's Department.

IT IS FURTHER AND FINALLY ORDERED that none of the foregoing persons, agencies, or organizations shall inspect or use said records, nor permit the inspection or use of said records except in accordance with the applicable provisions of Ohio Revised Code Sections 2953.53 and 2953.54 as currently enacted or as hereinafter amended.

/s/ DANIEL O. CORRIGAN
Judge

PETITIONERS' SUBMISSION TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT FOR RECONSIDERATION AND REHEARING EN BANC OF APPEALS NOS. 87-3378 AND 87-3657

Rule 14. EN BANC
REQUIRED STATEMENT FOR REHEARING, EN BANC

We express a belief, based on a reasoned and studied professional judgment, that the Panel decision of August 24, 1988, is contrary to the following decisions of the Supreme Court of the United States:

Allied Tube & Conduit Corp. v. Indian Head, Inc., _____ U.S. _____, 100 L.Ed.2d 497, 108 S.Ct. 1931, (1988);

Patrick v. Burget, _____ U.S. _____, 100 L.Ed.2d 83, 108 S.Ct. 1658 (1988);

Vodila v. Clelland, _____ U.S. _____, 97 L.Ed.2d 754, 107 S.Ct. 3255 (1987);

and the following decisions of the United States Court of Appeals for the Sixth Circuit:

Duncan v. Peck, 844 F.2d 1261 (1988);

Gaff v. Federal Deposit Ins. Corp., 828 F.2d 1145 (1987);

Thomas v. Shipka (II), 829 F.2d 570 (1987);

Vodila v. Clelland (II), 836 F.2d 231 (1987);

Westmac, Inc. v. Smith, 797 F.2d 313 (1986),

and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court.

We express a belief, based on a reasoned and studied professional judgment, that this appeal involves questions of exceptional importance:

I. Whether the First Count (designated by the Panel as "Count I, the civil rights claim") asserts as a common nucleus of operative facts: A trespass upon real property; a taking and detaining (conversion) of personal property; and, an injury to civil rights; and whether these wrongs give rise to three sets of claims based on violations of guaranteed liberties: (1) a pendent state law claim [Compl. ¶34]; (2) a federal claim arising under Section 1983 [Compl. ¶35]; and, another federal claim arising under 42 U.S.C. §1988 and the Constitution of the State of Ohio [Compl. ¶44]. The Panel did not answer the Question; the answer should be "Yes."

II. Whether the one year statute of limitations adopted in *Mulligan v. Hazard*, 777 F.2d 340 (6th Cir. 1985) for all Section 1983 claims brought in Ohio is to be applied automatically retroactively to all allegations of the First Count without evaluation and consideration of "clear past precedents" prior to December 8, 1982. The Panel did not answer the Question; the answer should be "No."

III. Whether the Supreme Court decisions in *Patrick v. Burget* and *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, narrow and restrict judicially created immunity for anticompetitive conduct so that the dissent in *Westmac, Inc. v. Smith*, 797 F.2d 313, at 320-323, should be adopted so that an abuse of process falls within the sham exception to the *Noerr-Pennington* doctrine defense and the antitrust law Second and Third Counts should not have been dismissed by summary judgment on motion of the Combustion Engineering defendants and sua sponte by the district court for defendant Hubbell. The Panel did not answer this Question; the answer should be "Yes."

IV. Whether an evidentiary rule of the Sixth Circuit adopted in *Duncan v. Peck*, 844 F.2d 1261 (1988), requires that an immunity defense to the Second and

Third Counts be supported by affidavits from defendants or their attorneys that any or all of them were acting in "good faith" when seeking out the participation of "state prosecutor" or "prosecutors office" for actions leading to the destruction of plaintiff and his company as business competitors. The Panel did not answer this Question; the answer should be "Yes."

V. Whether the Panel has failed to understand the factual base, as evidenced by Exh. 2 (App. 122, 123), for the "present effect and therefore continuing violation" alleged in Complaint ¶¶78, 79 and 80 (App. 33, 34), and has misapplied a statement by the Supreme Court in *United Airlines, Inc. v. Evans,* 431 U.S. at 558, (a Title VII present-effects-of-past discrimination case). The answer should be "Yes." Cf., the analysis in *Stewart v. CPC International, Inc.,* 679 F.2d 117, beginning at 120 (7th Cir. 1982).

Relief Requested

En Banc reconsideration of the Order and decision filed August 24, 1988, reversal and setting aside of the rulings by the district court identified in the two Notice of Appeal documents (App. 99-102 and App. 437-439), and remand of the case for a plenary trial on the merits as to all requests and claims in the Complaint, as amended, with such instructions as this Court shall deem necessary and required by all apparent facts of the case.

Respectfully submitted,

/s/ EDNA REBECCA HAZELETT-COOK
/s/ MACK D. COOK, II
Attorneys of record for plaintiffs-appellants
900 First National Tower
Akron, Ohio 44308

PETITION FOR REHEARING

On August 24, 1988, a Panel of this Court, Lively, Merrit and Krupansky, wrote a decision which caused an Order to be entered in favor of all eleven defendants-appellees on all issues in both appeals. There had been no trial or even an evidentiary hearing in the district court. Facts alleged in the Complaint and corroborated by plaintiffs' discovery have not been considered by the Panel. A copy of the seven (7) page decision by the Panel, which confirms judicial immunity for the alleged conspiracies and predatory conduct, is reproduced after the Proof of Service. The decision copy mailed to appellants' counsel bears a stamp "NOT RECOMMENDED FOR FULL-TEXT PUBLICATION."

The Decision of August 24, 1988

Read for result, the decision of the Panel is a blanket confirmation of the thinking of the district court as set forth in eleven documents. (Dkt. Nrs. 52, 53, 81, 97, 98, 105, 106, 107, 108, 118 and 119) originated in a time period beginning 2-19-86 and ending 6-10-87, about 17 months of district court time.

Read for reasoning and logic, the decision keys on but two undisputed facts: Fact 1, a search and seizure by private persons at the home of plaintiff Smith on *12-8-81,* without any official involvement by a state prosecutor or prosecutor's office; Fact 2, an alleged coerced plea bargain guilty plea to a lesser offense of receiving stolen property of a value less than $150.00 on *1-13-84.*

The Panel decision (see Part II) has affirmed the automatic retroactive application of the precedent of *Mulligan v. Hazard,* 777 F.2d 340 (6th Cir. 1985), *cert.*

denied, 476 U.S. 1174 (1986), to dismiss all claims of the First Count of the Complaint because of Fact 1, the search and seizure which had occurred on *12-8-81.*

The Panel (see Part III) has affirmed the dismissal of the separate antitrust counts (the Second and the Third Counts) by application of the precedent of *Potters Medical Center v. City Hospital Assn.,* 800 F.2d 568, 578 (6th Cir. 1986), a case "in which this court had held that a defendant's activities against a competitor could not be considered a sham where the defendant's position prevailed."

The Panel decision indicates approval that the district court had "denied the plaintiffs' contention that the defendants' conduct came within the 'sham exception' to the *Noerr-Pennington* doctrine", by rejecting plaintiffs' argument because "the defendants could [never as a matter of federal law] be found to have fostered a baseless prosecution since they prevailed in their position when the plaintiffs pled guilty."

Prior to hearing on July 29, 1988, a list of citations updating the briefs of appellants was presented to the Panel. This submission was a letter on the stationery of Cook and Cook, addressed to the Court Clerk with the date of July 1, 1988. At hearing, advocate counsel for appellants asked the presiding judge whether the July 1 letter was in the file of each panel member. Counsel was informed that the letter of July 1 was in each file.

Having read the Panel decision, it seems as though the appellants' additional citations though filed (by Order of the Court issued July 27, 1988), were not considered. Therefore, to the extent that further pagination for this pleading permits, reference will now be made to certain of the additional citations. So that the

appeal record will be complete, the entire text of the letter of July 1, 1988, is incorporated herein by general reference.

Discussion as to Questions 1 and 2 and Dismissal of the First Count as Affirmed

Question 1 can be answered "Yes", if reference is made to the current precedent of *Gaff v. Federal Deposit Ins. Corp.*, 828 F.2d 1145, a case in which this Court held that separate claims in a Count must each be evaluated and "expressly addressed," before a dismissal of the entire Count may be reviewed on appeal. *Id.*, at 1151.

The Complaint in this case is clear. A common nucleus of operative facts is alleged describing three types of tortious conduct. These alleged wrongs give rise to three sets of claims based on violations of guaranteed liberties. In the Complaint, paragraph 1, subject matter jurisdiction for the state law claim of ¶34 is created by the pleading of 42 U.S.C. §1332, for the federal law claim under Section 1983 by the conventional pleading of 42 U.S.C. §1343 and for the third claim under 42 U.S.C. §1988 by the pleading of 28 U.S.C. §1331.

The interests of fair administration of federal court justice require that Question 1 be answered by this Court, if for no other reason than to preserve the question presented by blanket dismissal of all claims in the First Count by retroactive application of *Mulligan v. Hazard.*

The proper answer to Question 2, "No", will follow from recognition of the impact of the Supreme Court decision in *Vodila v. Clelland*, (97 L.Ed. 2d 754, 107 S.Ct. 3255) and two follow up decisions by this Court in *Thomas v. Shipka* (II), 829 F.2d 570 and *Vodila v. Clelland* (II), 836 F.2d 231.

Quoting from *Thomas v. Shipka* (II), (829 F.2d at 572, footnote omitted), the *Vodila* court (836 F.2d at 232) observed that the Supreme Court's action "compels the conclusion that the one-year statute of limitations adopted in *Mulligan* for all Section 1983 claims brought in Ohio is *not* to be applied retroactively and that the decision as to retroactivity must be made on a case-by-case basis."

The rationale of *Vodila* (836 F.2d at 232) may be, in fair paraphrase, now presented in argument as follows:

> The most significant question presented in this case, as *Thomas* teaches, is whether the precedents that were available for inspection by Lester Smith during the one-year period after the search and seizure established that he had at least three years and eleven plus months (the length of time he actually waited) in which to file the §1983 claim of the First Count of his action. Thus if clear past precedent showed that he was entitled to defer the filing of his complaint for up to six years by reason of O.R.C. §2305.07 (which establishes a six-year limitations period for actions upon a liability created by statute and actions upon a contract not in writing), or up to four years by reason of O.R.C. §2305.09 (which governs certain non-contractual actions), it would be inequitable for the courts to tell Lester Smith, after the fact, that an action commenced within three years and eleven plus months was not timely filed.

The multifaceted conspiracies against plaintiffs were in place and working during July, August, September, October and November of 1981. The scheme of defendants against plaintiffs' rights did not become known to plaintiff until the "search and seizure" on 12-8-81. The immediately attendant "extensive media reporting and coverage as to the allegations of defendant

C-E Cast Equipment against plaintiffs Lester W. Smith and personnel of Western Reserve Group, Inc." (quote from Compl. ¶33, App. 18) began on 12-8-81. Therefore, following the precedent from *Vodila*, the clear past precedent period which should now be considered and reviewed is the one-year period between December, 1981 to December, 1982.

For the present purpose of seeking a rehearing on the automatic retroactive application of *Mulligan v. Hazard*, movant counsel now submit for consideration, the "Discussion of clear past precedents prior to December 8, 1982," quoted verbatim from the letter of July 1, 1988, pages 6 and 7.

Discussion of clear past precedents prior to December 8, 1982

98 A.L.R.2d 1160, (1964) was a reference authority for the Question: What Statute of Limitations is applicable to a damage action under Federal Civil Rights Act. This text, at 1164 refers to *Crawford v. Zeitler* (6th Cir. 1964), which would apply O.R.C. §2305.09 if cause of action is *not* for malicious prosecution and false imprisonment, but *is* for tortious conduct and acts in concert or conspiracy.

Cohen v. Norris (9th Cir. 1962), is a cause supporting pleading a §1983 cause of action with a specific allegation as to unreasonable searches and seizures. (Search and seizure is arbitrary and unreasonable if not authorized by law). 300 F.2d 24

Garner v. Stephens (6th Cir. 1972) held that a school teacher fired for pregnancy who brought action under §1983 where no physical injury is involved or claimed is entitled to a five year statute of limitations and is *not* barred by a Kentucky one year statute against actions brought for an injury to the person of the plaintiff. 460 F.2d 1144

Gordon v. City of Warren (ED Mich. 1976). Judge Phillip Pratt observed that reported decisions "reflect indecision over the proper approach" for application of the statute of limitations with unique facts of the controlling rule—"to adopt the most analogous state statute of limitations" (415 F.Supp. at 558). 415 F.Supp 556

Hines v. Bd. of Educ. (6th Cir. 1982), was a *per curiam* decision in a school teacher wrongful dismissal case (plaintiff had unsuccessfully litigated a state law claim that she had been illegally dismissed). This Court footnote cited *Robertson v. Wegmann*, (argued blue cover brief '3378 Appeal, pp. 25, 26, 49) but applied the Kentucky one year limitation for an action for slander. 667 F.2d 564

Madison v. Wood (6th Cir. 1969), says that an officer alleging wrongful demotion more than three years before complaint filed is time barred. But, see footnote 3, the nature of the injury determines the appropriate remedy, and citation of the 9th circuit decision on *Cohen v. Norris.* 410 F.2d 564

Mason v. Owens Illinois, Inc. (6th Cir. 1975), gave plaintiff in an employment discrimination case the right to proceed in district court with the six year limitation from O.R.C. §2305.07. This precedent was available to plaintiffs here even though they would designate the same four year period of limitation for both the civil liberties and the antitrust counts. 517 F.2d 520

Minchella v. Estate of Stillman (6th Cir. 1966), is authority for a time bar against an allegation of joint conspiracy to imprison illegally when the complaint was filed more than two years after release from prison. But, Lester Smith could not on the facts make a claim under an imprisonment theory (he did file *before* his "probation period" ended). 356 F.2d 52

The final update citation presented in this letter will be *Schorle v. The City of Greenhills,* (S.D. Ohio 1981). The *Thomas* court summarized *Schorle* (829 F.2d at 574) by observing that Judge Spiegel concluded Schorle's Section 1983 claim was broader than a common law tort and therefore opted for the four-year residual statute of limitations contained in O.R.C. 2305.09. While *Schorle* was not the final word on the subject in 1983 (when the cause of action arose for Thomas), it was the final word on the subject in December 1981 (when the cause of action arose for Smith and WRG). 524 F.Supp 821

If the Panel will fairly reconsider on the basis of the above showing of clear past precedent, the affirmation of dismissal of the First Count should be reversed. Otherwise, the interests of fair administration of federal court justice require that Question 2 be answered and fully reconsidered by this Court; again to preserve the full scope of the issue involving the statute of limitations time bar defense.

Discussion as to Questions 3 and 4 and Dismissal of the Second and Third Counts as Affirmed

On the First Monday of October in 1987, the Supreme Court granted certiorari in two cases which had reached the high court from the Ninth and the Second Circuits. In both cases, there had been jury trial and circuit review on a complete record. The review granted 10-5-87 was for two cases dealing with the extent to which judicially created immunity should, or should not, be applied in favor of defendants for anticompetitive conduct.

In *Patrick v. Burget,* a jury award and district court trebling of $650,000 damages on Sherman Act claims was reinstated over a reversal by the Ninth Circuit (800 F.2d 1498).

The unanimous Supreme Court presented the question as whether the state-action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), protects physicians in the State of Oregon from federal antitrust liability for their activities on hospital peer-review committees. The Ninth Circuit said it did, the United States Supreme Court said it did not.

The Supreme Court reaffirmed a rigorous two-pronged test to determine whether anticompetitive conduct engaged in by private parties should be deemed state action and thus shielded from the antitrust laws. First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy." Second, the anticompetitive conduct must be "actively supervised" by the State itself.

The Supreme Court concluded that the case at bar did not require it to decide the broad question whether judicial review of private conduct ever can constitute active supervision.

On reconsideration, the Panel may rationalize that the role played by the State Court judge, from the plea of not guilty *2-22-82* to the bargained plea of guilty *1-13-84* was "active supervision." However, such rationale would be capricious."* As best said for defendants' antitrust immunity defense, the proceedings supervised by the Ohio court were prosecutorial, without trial and summary in disposition of pretrial motions for the defendants there—plaintiffs here—who never confessed but were coerced.

---

* Such an argument also disregards the State Court Judge's order '. . ., that the proceedings in this case shall be deemed not to have occurred . . ." See, plaintiffs' Exh. 300, App. 455. (A60, *supra.*)

The tandem case for review of judicially created immunity for anticompetitive conduct resulted in affirmance of *Indian Head, Inc. v. Allied Tube & Conduit Corp.* (817 F.2d 938), cited in the blue cover brief for Appeal '3657. Plaintiffs offered a summation of the federal law on the *Noerr-Pennington* doctrine by direct quotation of the Second Circuit (from 817 F.2d at 942) on brief pages 7-9.

In *Allied Tube & Conduit v. Indian Head, Inc.* the petitioner contended that its efforts to affect the product standard-setting process of a private association were immune from antitrust liability under the *Noerr-Pennington* doctrine primarily because the association's standards were widely adopted into law by state and local government. The Second Circuit said it did not. The United States Supreme Court also said it did not.

Justice Brennan writing for a 7-2 majority in *Allied Tube* begins with a review of facts proven by the jury trial. The jury instructions, answers to special interrogatories and the jury's special findings were each considered.

Part II of the Opinion begins with a mandate—the scope of this [*Noerr-Pennington*] protection depends, however, on the source, context, and the nature of the anticompetitive restraint at issue.

The Panel decision has focused exclusively on a single act by the plaintiff person Fact 2, the coerced plea bargain agreement of 1-13-84. The Panel has expressed no interest in nor reached any conclusion as to the source, context, and nature of the anticompetitive restraints by defendants at issue—the conspiracies and actions beginning mid-year 1981 creating and maintaining monopoly power to at least March 13, 1987.

When the state grand jury indicted, there were mere allegations of several crimes which can be shown at a plenary trial on the merits as having been capable of no reasonable proof. At trial, a false assertion by the Combustion Engineering defendants of trade secrets will be shown as yet another form of antitrust violation. See, *CVD, Inc. v. Raytheon Co.*, 769 F.2d 842 (1st Cir. 1985), *cert. denied*, 474 U.S. 1016 (1986). (Assertion of trade secret claim in bad faith is a predatory practice under antitrust laws.)

The proper answer to Question 3, "Yes", would point this Circuit and the right rule or logic for judicially created immunity for anticompetitive conduct toward the Second Circuit in *Indian Head, Inc. v. Allied Tube & Conduit Corp.*, 817 F.2d 938 (1987) and the Seventh Circuit in *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466 (1982).

The Panel should not have overlooked the well-reasoned dissent in *Westmac, Inc. v. Smith*, 797 F.2d 313 (6th Cir. 1986) as applying to the facts of this case, to wit: defendants' business competitor was

> "driven out of the market by factors related to the litigation process itself-cost, delay, damage to reputation, decreased sales, etc.—long before any judgment in the action is rendered." *Id.* at 322.

Long before the guilty pleas were entered plaintiff Smith suffered loss of employment and income, paid expensive attorney's fees, was the subject of public disgrace and humiliation, and was burdened by the psychological trauma of over two years of uncertainties: A Kafkaesque experience, with only dark at the end of the tunnel [Exh. 2 (App. 122, 123) and Compl. ¶78]. Plaintiff WRG was forced to cease all business activities [Compl. ¶58]. The cost and delay of the state litigation, the damage to

plaintiffs' reputation and the termination of sales by WRG in competition with Combustion Engineering were the results of the *institution* of the litigation, not the results of the litigation itself.

The dissent in *Westmac, Inc. v. Smith,* seeks a definition of the *Noerr-Pennington* doctrine's sham exception "... that is clear and analytically sound as well as functional." The dissent recognizes the clear distinction between "abuse of process" and "malicious prosecution." The dissent would hold that any rule or logic for decision that the existence of an "issue of substance" or "colorable claim" should be held to create a constitutional presumption—rebuttable or irrebuttable—of no judicial abuse of process, and hence no sham, is wrong.

The proper answer to Question 4, "Yes", is clear, particularly with benefit of *Duncan v. Peck,* 844 F.2d 1261. Defendants seeking immunity by a Rule 56 summary judgment for anticompetitive conduct alleged to be conspiratorial and predatory must have some or a minimal evidentiary burden. The Panel has said that the district court correctly found "As to plaintiffs claims of conspiracy between the defendants and unnamed co-conspirators, the plaintiff has alleged no set of facts that would remove the defendants conduct from the shield of the *Noerr-Pennington* doctrine." It is clear from the Panel decision, that the key and only fact which plaintiff could not allege—the State Court criminal proceeding did terminate in plaintiff's favor—is considered controlling. To require defendants to assert that the State court proceeding was in "good faith" is logical and consistent with even handed rendering of justice by courts of this Circuit. Ends must not always justify means.

Statement and Conclusion

The result reached by the Panel decision sends a message to any company doing business in the four states of this Circuit. A company which wants "to possess or attempt to possess monopoly power", in a relevant market or actual market; a company which would "maintain that monopoly power by willful acquisition as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident [Compl. ¶50]; a company which has no issued patents or registered trademarks or copyrights or bona fide trade secrets—can still destroy a fledgling or up-and-coming business competitor without risk of antitrust or Sherman Act sanction.

Following the pattern of the Combustion Engineering defendants in this case who discovered that previous customers were buying from an unknown competitor: A company facing competition can hire a zealous private investigator who will even look at garbage set out for trash collection; identify and suborn at least one supplier to the competitor [in this case, defendant Lawrence K. Hubbell]; retain prominent local counsel and take sworn statements [shielded in this case, from pretrial discovery by claiming privilege]; talk to a county prosecutor; obtain a search warrant from a distinterested magistrate (here, a judge in another county); make a search and seizure at the competitor's place of business using a company employee [defendant Fisher] and the private investigator; use the sensationalism of TV and the print media during and after the search; get an indictment for several offenses through an available prosecutor; have the friendly prosecutor protract the prosecution for months or years before agreeing to accept a guilty plea to a minor

offense; ask for money restitution to impoverish the competitor; and, finally swap the money from restitution for a covenant not to compete for an additional three-year period.

The Combustion Engineering defendants did all of these things and have now been shielded by two courts in Sixth Circuit.

Respectfully submitted,

EDNA REBECCA HAZELETT-COOK
MACK D. COOK, II

PROOF OF SERVICE

One copy of the foregoing PETITION FOR REHEARING with SUGGESTION FOR REHEARING EN BANC will have been mailed not later than September 7, 1988, by first class U. S. mail, postage prepaid, to Walter A. Bates, Esq., 1100 Huntington Building, Cleveland, Ohio 44115, Attorney for the ten related defendants other than Lawrence K. Hubbell, and to William A. Hamann, Jr., Esq., 24549 Detroit Road, Westlake, Ohio 44145, and to James J. Dyson, Esq., Brainard Place, 29001 Cedar Road, Cleveland, Ohio 44124, both attorneys for Lawrence K. Hubbell.

/s/ EDNA REBECCA HAZELETT-COOK
Attorney for Appellants

(The undersigned attorney has no firm name or address for David G. Utley, identified as receiving a copy of the order and decision filed August 24, 1988.)

/s/ EDNA REBECCA HAZELETT-COOK

PETITIONERS' STATEMENT OF ISSUES PRESENTED FOR REVIEW, COURT OF APPEALS FOR THE SIXTH CIRCUIT, APPEAL NO. 87-3761

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. WHETHER FULL FAITH AND CREDIT AND A STATE COURT JUDGMENT OF EXPUNGEMENT OF CONVICTION HAVE AN EFFECT ON EARLIER JUDGMENTS OF THE DISTRICT COURT IN THIS CASE.

II. WHETHER DENIAL OF A TIMELY FILED RULE 60(b) MOTION BASED ON A STATE COURT JUDGMENT OF EXPUNGEMENT FOR RECONSIDERATION OF A DISTRICT COURT JUDGMENT GOES AGAINST THE UNITED STATES CONSTITUTION, ARTICLE 4, SECTION 1, FEDERAL STATUTES, THE OHIO EXPUNGEMENT STATUTE, THE OHIO CASE LAW ON ORDERS OF EXPUNGEMENT, OR THE RULES OF EVIDENCE AND IS THEREFORE WRONG AND AN ABUSE OF DISCRETION BY THE DISTRICT COURT.

LETTER FOR PETITIONERS, DATED JULY 1, 1988, LIST OF CITATIONS UPDATING THE BRIEFS OF APPELLANTS FOR APPEALS NOS. 87-3378 and 87-3657

COOK & COOK
Attorneys at Law
900 First National Tower
Akron, Ohio, U.S.A. 44308
(216) 376-1005

MACK D. COOK, II
REBECCA H. COOK

Canton
(216) 497-2665

July 1, 1988

Office of the Clerk
United States Court of Appeals
For the Sixth Circuit
U. S. Post Office & Courthouse Bldg.
Cincinnati, OH 45202

Re: In The Matter of Consolidated
Appeals No. 87-3378 and No. 87-3657
and
List of Citations Updating the Briefs of Appellants

Gentlemen:

This letter is submitted by plaintiffs-appellants as original and three (3) copies. By stipulation with Walter Bates, Esq. (made 6-2-88), one service copy each of this letter will have been mailed as of July 1, 1988, to all counsel of record for all defendants-appellees (Messrs. Bates and Hamann and Dyson).

The Complaint was drafted in 1985, once amended after discovery and a deposition, to present eighty (80) paragraph allegations and three counts with multiple claims and prayers for cumulative and separate money damages.

Briefing of these appeals took place in the months June to September 1987.

From January 1988 to date, counsel for plaintiffs have made a reasoned and studied professional judgment that selected additional authorities having informational and precedential value need to be directed to the attention of this Court, before rather than at or after hearing and decision.

The update citations are first listed alphabetically; the recent decisions from the Supreme Court are summarized for relevance; and, most of the citations are precisely applied by argument to the old issues and questions presented in the briefs.

[2] *Update citations listed alphabetically*

Allied Tube & Conduit Corp. v. Indian Head Inc., (No. 87-157), _____ U.S. _____ (1988) (decided 6-13-1988, 56 U.S.L.W. 4539).... 15,17

American Law Reports Annotated, Second Series (1964) 98 A.L.R.2d 1160..... 6

Bendix Autolite Corp. v. Midwesco Enterprises, Inc., No. 87-367, (oral argument 3-23-88, 56 U.S.L.W. 3682)..... 10,11

Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 820 F.2d 186 (6th Cir. 1987)..... 9,10

Black Law Enf. Officers Ass'n. v. City of Akron, 824 F.2d 475 (6th Cir. 1987), (Please insert citation on page -ii- and page 21 of gray cover brief for Appeal '3378)

Burlington Northern (In re), 822 F.2d 518 (5th Cir. 1987), (cert. denied as *Union Pacific Railroad Co. v. Energy Transportation System, Inc.*, No. 87-705, _____ U.S. _____ (56 U.S.L.W. 3447)... 16

CVD, Inc. v. Raytheon Co., 769 F.2d 842 (1st Cir. 1985) (Assertion of trade secret claim in bad faith is a predatory practice under antitrust laws.)..... 4

Chevron v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971)

Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, 690 F.2d 1240 (9th Cir. 1982) (Please insert page citation 1259 on page 14 of blue cover brief for Appeal '3378)

Cohen v. Norris, 300 F.2d 24 (9th Cir. 1962)..... 6

Constantine v. City of Akron, _____ F.Supp. _____ (N.D. Ohio, E.D., 1988) (No. 86-1269A, decided October 30, 1987) (Judge Krenzler used collateral estoppel to bar §1983 claim *when* plaintiffs are given a full and fair opportunity to litigate legality of the search and seizure at the criminal proceedings in state court.)

Crawford v. Zeitler, 326 F.2d 119 (6th Cir. 1964) 6

Duncan v. Peck, 844 F.2d 1261 (6th Cir. 1988)..... 13

Gaff v. Federal Deposit Ins. Corp., 828 F.2d 1145 (6th Cir. 1987) (rehearing of same case, 814 F.2d 311) 7,8,9

Garner v. Stephens, 460 F.2d 1144 (6th Cir. 1972)... 6

[3] *Goodman v. Lukens Steel Co.*, _____ U.S. _____, 107 S.Ct. 2617, 96 L.Ed.2d 572 (1987).. 4,11,12

Gordon v. City of Warren, 415 F.Supp. 556 (ED Mich., 1976) rev'd. on other grounds, *Gordon v. Warren*, 579 F.2d 386 (6th Cir. 1978)..... 6

Hines v. Bd. of Educ., 667 F.2d 564 (6th Cir. 1982)..... 6

Indian Head, Inc. v. Allied Tube & Conduit Corp., 817 F.2d 938 (2nd Cir. 1987)..... 15

Kentucky v. Long, 837 F.2d 727 (6th Cir. 1988) (Demonstrates in depth analysis of pattern of conduct and legal logic as to an immunity from litigation established by the Supremacy Clause of the Constitution of the United States)

Madison v. Wood, 410 F.2d 564 (6th Cir. 1969) 7

Mason v. Owens Illinois, Inc., 517 F.2d 520 (6th Cir. 1975)..... 7

Minchella v. Estate of Stillman, 356 F.2d 52 (6th Cir. 1966) 7

Okure v. Owens, 816 F.2d 45 (2nd Cir. 1987) 11

Owens v. Okure, No. 87-56, (cert. granted 3-22-88, 56 U.S.L.W. 3647, for *Okure v. Owens*) 10,11,12

Patrick v. Burget, (No. 86-1145,) _____ U.S. _____ (1988) decided 5-16-1988, 56 U.S.L.W. 4430) 14,17

St. Francis College v. Al-Khazraji, _____ U.S. _____, 107 S.Ct. 2022, 95 L.Ed.2d 582 (1987) .. 4,11

Schorle v. The City of Greenhills, 524 F.Supp. 821 (S.D. Ohio 1981) 7

Sessions Tank Liners v. Joor Mfg. Inc., 827 F.2d 458 (9th Cir. 1987) 17

Thomas v. Shipka (II), 829 F.2d 570 (6th Cir. 1987).. 4,5

Vodila v. Clelland, _____ U.S. _____, 107 S.Ct. 3255, 97 L.Ed.2d 754 (1987) 4,11

Vodila v. Clelland (II), 836 F.2d 231 (6th Cir. 1987).. 4

[4] *Recent decisions from the Supreme Court relating to the First Count*

In Appeal '3378 this Court is asked to reverse decisions by the district court which summarily dismissed the First Count of the Complaint, filed 11-18-85 amended with leave 1-23-86, on the basis of retroactive application of *Mulligan v. Hazzard* and an Ohio law one-year limitation period.

There have been three Supreme Court decisions since the briefing schedule was complete:

St. Francis College v. Al-Khazraji, (an affirmance of *Al-Khazraji v. St. Francis College,* 784 F.2d 505, cited in blue cover brief for Appeal '3378, p. 41.);

Goodman v. Lukens Steel Co.; and,

Vodila v. Clelland.

Each case has applied a rule of law from the 1971 Supreme Court decision *Chevron v. Huson,* (sets forth a three-part test to be used for retroactive application of decisions adopting a new statute of limitations).

The four Supreme Court decisions were applied by a panel of this Court (Judges Engel, Krupansky and Guy) in *Thomas v. Shipka (II),* decided 11-18-87; on petition for rehearing of *Thomas v. Shipka (I),* 818 F.2d 496 (cited blue cover brief for Appeal '3378, p. 39). Ms. Thomas was discharged from her job with the Parma Municipal Courts on 4-7-83: nearly two years later, on 4-5-85, plaintiff filed suit in district court.

On remand from the Supreme Court, another panel of this court (Judges Keith, Nelson and Boggs) in *Vodila v. Clelland (II),* decided 12-28-87, reconsidered the case of John D. Vodila employed as a dentist in a mental

hospital operated by the State of Ohio. On 7-20-80 Dr. Vodila was discharged for alleged neglect of duty and incompetence. The action was filed in district court 4-6-83.

During past weeks, counsel for plaintiffs have studied *Thomas v. Shipka (II)* and *Vodila v. Clelland (II)* to determine how this Court will [5] determine the retroactive application of an Ohio statute of limitations adopted under *Wilson v. Garcia.*

Quoting from *Thomas v. Shipka (II),* (829 F.2d at 572, footnote omitted), the *Vodila* court observed that the Supreme Court's action "compels the conclusion that the one-year statute of limitations adopted in *Mulligan* for all Section 1983 claims brought in Ohio is *not* to be applied retroactively and that the decision as to retroactivity must be made on a case-by-case basis."

The rationale of *Vodila* may be, in fair paraphrase, presented in argument as follows:

> —The most significant question presented in this case, as *Thomas* teaches, is whether the precedents that were available for inspection by Lester Smith during the one-year period after the search and seizure established that he had at least three years and eleven plus months (the length of time he actually waited) in which to file the §1983 claim of the First Count of his action. Thus if clear past precedent showed that he was entitled to defer the filing of his complaint for up to six years by reason of O.R.C. §2305.07 (which establishes six-year limitations period for action upon a liability created by statute and actions upon a contract not in writing), or up to four years by reason of O.R.C. §2305.09 (which governs certain non-contractual actions), it would be inequitable for the courts to tell Lester Smith, after the fact, that an action commenced within three years and eleven plus months was not timely filed.—

Following their understanding of *Vodila*, plaintiffs' counsel considered work product papers prepared during October-November 1985 and the authorities cited in the district court and argued again to this Court. See, blue cover brief for Appeal '3378, Issue IV, pp. 23-45, and red cover brief for Appeal '3378, Issue IV, pp. 21, 22.

The multifaceted conspiracies against plaintiffs were in place and working during July, August, September, October and November of 1981. The scheme by defendants against plaintiffs' rights did not become known to [6] plaintiff until the "search and seizure" on 12-8-81. The "clear past precedent" period of *Vodila* is the one-year period between December 1981 to December 1982.

The following citations are available for this Court to now determine it would be inequitable for the courts to tell Lester Smith, after the fact, that an action commenced within four years was not timely filed. [The Complaint, ¶2, alleges "This action is timely filed by virtue of Title 15 U.S.C. §15b and Ohio Revised Code §2305.09 (four-year statute of limitation)."]

Discussion of clear past precedents prior to December 8, 1982

98 A.L.R.2d 1160, (1964) was a reference authority for the Question: What Statute of Limitations is applicable to a damage action under Federal Civil Rights Act. This text, at 1164, refers to *Crawford v. Zeitler* (6th Cir. 1964), which would apply O.R.C. §2305.09 if cause of action is *not* for malicious prosecution and false imprisonment, but *is* for tortious conduct and acts in concert or conspiracy.

Cohen v. Norris (9th Cir. 1962), is a case supporting pleading a §1983 cause of action with a specific allegation as to unreasonable searches and seizures. (Search and Seizure is arbitrary and unreasonable if not authorized by law).

Garner v. Stephens (6th Cir. 1972) held that a school teacher fired for pregnancy who brought action under §1983 where no physical injury is involved or claimed is entitled to a five year statute of imitations and is *not* barred by a Kentucky one year statute against actions brought for an injury to the person of the plaintiff.

Gordon v. City of Warren (ED Mich. 1976). Judge Phillip Pratt observed that reported decisions "reflect indecision over the proper approach" for application of the statute of limitations with unique facts of the controlling rule—"to adopt the most analogous state statutes of limitations" (415 F.Supp at 558).

Hines v. Bd. of Educ. (6th Cir. 1982), was a *per curiam* decision in a school teacher wrongful dismissal case (plaintiff had unsuccessfully litigated a state law claim that she had been illegally dismissed). This Court footnote cited *Robertson v. Wegmann*, (argued blue cover brief '3378 Appeal, pp. 25, 26, 49) but applied the Kentucky one year limitation for an action for slander.

[7] *Madison v. Wood* (6th Cir. 1969), says that an officer alleging wrongful demotion more than three years before complaint filed is time barred. But, see footnote 3, the nature of the injury determines the appropriate remedy, and citation of the 9th circuit decision on *Cohen v. Norris.*

Mason v. Owen Illinois, Inc. (6th Cir. 1975), gave plaintiff in an employment discrimination case the right to proceed in district court with the six year limitation from O.R.C. §2305.07. This precedent was available to

plaintiffs here even though they would designate the same four year period of limitation for both the civil liberties and the antitrust counts.

Minchella v. Estate of Stillman (6th Cir. 1966), is authority for a time bar against an allegation of joint conspiracy to imprison illegally when the complaint was filed more than two years after release from prison. But, Lester Smith could not on the facts make a claim under an imprisonment theory (he did file *before* his "probation period" ended).

The final update citation presented in this letter will be *Schorle v. The City of Greenhills,* (S.D. Ohio 1981). The *Thomas* court summarized *Schorle* (829 F.2d at 574) by observing that Judge Spiegel concluded Schorle's Section 1983 claim was broader than a common law tort and therefore opted for the four-year residual statute of limitations contained in O.R.C. 2305.09. While *Schorle* was not the final word on the subject in 1983 (when the cause of action arose for Thomas), it was the final word on the subject in December 1981 (when the cause of action arose for Smith and WRG).

A further update citation from Sixth Circuit relevant to the First Count

Gaff v. Federal Deposit Ins. Corp. (6th Cir. 1987), became relevant to this case on rehearing of the same case. In *Gaff*, plaintiff asserted three sets of claims in one count in his individual capacity as a shareholder: (1) federal claims arising under the federal banking laws; (2) federal claims arising under the federal securities laws; and, (3) pendent state law claims. In both appeals, this Court upheld dismissal of the two federal claims because plaintiff lacked standing to maintain direct causes of action under provisions of federal law. However, on

rehearing this Court concluded that the district court properly retained jurisdiction of the state law claim but made no specific finding as to that claim before dismissal. The Court (Judges Engel, Boggs and Contie) said—"Only after the district court has fully addressed [8] Gaff's allegations and made specific findings with respect to them will we be able to engage in proper review and determine whether Gaff has stated a viable direct cause of action under state law" (828 F.2d at 1151).

In this case, the district court treated the First Count as though making only a Section 1983 claim. In the First Count (designated by the district court as "Count I") plaintiffs have asserted a common nucleus of operative facts: A trespass upon real property; a taking and detaining [conversion] of personal property; and, an injury to civil rights.

These wrongs give rise to three sets of claims based on violations of guaranteed liberties: (1) a pendent state law claim [¶34]; (2) a federal claim arising under Section 1983 [¶35]; and, (3) another federal claim arising under 42 U.S.C. §1988 and the Constitution of the State of Ohio [¶44].

In the Complaint, paragraph 1, subject matter jurisdiction for the state law claim is created by the pleading of 42 U.S.C. §1332 (Diversity of Citizenship—defendants Combustion Engineering, Calvert, Kelly and Santry are in Connecticut). Jurisdiction for the federal law claim under Section 1983 is conventionally created by the pleading of 42 U.S.C. §1343. For the third claim under 42 U.S.C. §1988, jurisdiction is created by the pleading of 28 U.S.C. §1331 (Federal Question).

The district court has on three occasions addressed the First Count (2-19-86, 7-29-86 and 3-24-87, Con. Jt. App. 79, 93 and 96). On each occasion, the district court has written too narrow, has commingled, the state law and the Section 1988 claims with the separate claim for a Section 1983 violation. Under the recent authority of *Gaff,* we are permitted to point out the three types of claims combined in the First Count. It further follows from *Gaff,* that the total dismissal of the First Count must be reversed and remanded, at least to the extent that the district court can make specific findings about a time bar defense as to the state law and Section 1988 claims in the First Count.

As comment only, without criticism, we refer to the Order of this Court (Judges Keith, Norris and Edwards) filed April 11, 1988, dismissing Appeal No. 87-3761 for lack of appellate jurisdiction. The second paragraph [9] on page 1 refers to plaintiffs' ". . . alleged claims against each of eleven named defendants and three unnamed defendants under *42 U.S.C. §1983* and 15 U.S.C. §§1, 2" [emphasis supplied]. To preserve the question presented on blanket dismissal of *all claims* in the First Count, by retroactive application of *Mulligan v. Hazard,* and proceeding on the authority of *Gaff,* this question is respectfully brought to the attention of this Court prior to oral argument.

Another pending decision from the Supreme Court about Sixth Circuit views on applying an Ohio Statute of Limitations

Bendix Autolite Corp. v. Midwesco Enterprises, Inc. was decided June 3, 1987, by Judges Martin, Jones and Milburn. The decision was that Ohio's tolling statute, O.R.C. 2305.15, places an impermissible burden on

interstate commerce and *per se* violates the Commerce Clause. Plaintiffs were under a "disability" precluding commencement of this case in the federal court system until after "sentence" by the State Court on January 13, 1984. (Perhaps, the disability to proceed with federal court litigation against the defendants continued until the "probation period" was ended by State Court Order on 1-12-85.) However, the *Bendix Autolite* decision precluded raising as an appeal issue a claim for benefit of §2305.15.

The amended Complaint paragraphs 78, 79 and 80 (App. 33, 34) make factual allegations as to the condition of plaintiff Lester W. Smith before, on and after January 13, 1984. The district court Order of 3-24-87, second page (App. 76), includes a paragraph:

> In requesting reconsideration, plaintiffs argue that their guilty pleas were coerced by such factors as the length of the prosecution, financial hardship, and humiliation and embarrassment. As the Court interprets it, plaintiffs' position seems to be that the Court should not have treated the guilty pleas as valid since they were allegedly coerced in one way or another.

The concept of "tolling" a statute of limitations by the facts of a plaintiff's case has origin in the common law. However, as a matter of [10] professional judgment based upon the specific wording of the Ohio tolling statutes (O.R.C. 2305.15 *and* 2305.16) and the then just available decision in *Bendix Autolite,* the equitable question of when "a cause of action accrues against . . ." the defendants in this case was not raised when the briefs were written in 1987.

Now, the acceptance for review by the Supreme Court of the constitutionally based decision of *Bendix*

Autolite (as No. 87-367) revives the issue which was before the district court as an appeal question before this Court.

The decision by the Supreme Court is forthcoming. Argument was heard 3-23-88 (56 U.S.L.W. 3682). To preserve the question presented on the dismissal of the First Count, by application of *Mulligan v. Hazard* without benefit of equitable "tolling", this question is respectfully brought to the attention of this Court prior to oral argument.

A pending decision from the Supreme Court about the Second Circuit view on statutes of limitation against a plaintiff's case since Wilson v. Garcia

Owens v. Okure, No. 87-56, cert. granted 3-22-88, will provide opportunity for the Supreme Court to evaluate the impact of *Wilson v. Garcia* on civil liberties cases filed in the federal court system by constitutionally wronged plaintiffs.

The plaintiff Tom U. U. Okure complained in district court that defendant state university police officers battered and beat him on the university campus. The arrest and alleged beating took place on 1-27-84. The Section 1983 action was filed twenty-two months later. The defendants moved to dismiss on a one-year time bar. The motion was denied (625 F.Supp. 1568). The district court permitted the interlocutory appeal and the order denying the motion to dismiss was affirmed 2-1.

For plaintiffs' case on this appeal, the words of the majority opinion should be persuasive—

> Even though civil rights violations are typically, and perhaps necessarily, intentional, that characterization is not [11] controlling. We believe

> that the *Wilson* Court's choice of the term "general" to describe personal injury torts analogous to section 1983 claims was neither casual nor superfluous. Rather, we read therein a command that our choice of statute of limitations from New York law be expansive enough to accommodate the diverse personal injury torts that section 1983 has come to embrace so as not to exclude claims that stray from a precisely drawn analogy. (816 F.2d at 48).

However, it is our professional duty to point out that Judge Van Graafeiland, in dissent, cast his lot "with those Courts of Appeals which hold that state limitation periods governing essentially all intentional personal injuries are better analogized to section 1983 claims that [sic] limitation periods confined almost entirely to unintentional torts." And, the first example is *Mulligan v. Hazard* (see, 816 F.2d at 51).

The issue of a statute of limitations or time bar was presented to the district court three times and was pending for fifteen months. The written arguments in the blue and grey cover briefs for Appeal '3378, as to Issue IV, remain meritorious.

Since *Wilson v. Garcia* (4-17-85), the Supreme Court has looked at the justice of using a statute of limitations as a time bar defense for an otherwise likely to be liable defendant in: *Saint Francis College* (5-18-87); *Goodman v. Lukens Steel* (6-19-87); and *Vodila v. Clelland* (6-26-87) [107 S.Ct. 2022; 2636; and, 3255].

During this Term, the Supreme Court has heard *Bendix Autolite* and granted certiorari in *Owens v. Okure.*

Whether the Supreme Court will come down for the expansive interpretation of *Owens v. Okure* or favor the restrictive application of *Mulligan v. Hazard* is yet to be

heard. (One solution, argued in the briefs for plaintiffs here, is to agree that any civil rights violation causes a personal injury, and such violations may cause something other than injury to the person. This would do away with the intentional/nonintentional question last raised by *Owens v. Okure.*)

[12] When *Owens v. Okure* is decided, the dissent of Justice O'Connor in *Wilson v. Garcia* (105 S.Ct. beginning at 1949) may become the majority reasoning. That dissent was followed by criticism of *Wilson* by Justice White in *Jones v. Preuit & Maudlin* (106 S.Ct. 893), and the dissent of Justices White and Marshall in *Mulligan v. Hazard* (106 S.Ct. 2902), and the implied criticism by Justice O'Connor in *Goodman v. Lukens Steel* (107 S.Ct. at 2636).

This Court has adequate and equitable reasons to return plaintiffs' First Count for adjudication of its merits. However, this case also would enable this Court to revisit with *Mulligan v. Hazard* to consider "the diverse personal injury torts that section 1983 has come to embrace so as not to exclude claims that stray from a precisely drawn analogy." (816 F.2d at 48).

As stated in appellants' blue cover brief for Appeal '3378, ". . . counsel for plaintiffs will agree with what was said by the *Mulligan* court as to a very short statute of limitations for a 'teacher tenure' case" (see, page 41).

[13] *The use of affidavits to support a summary judgment claim for immunity*

Duncan v. Peck, decided 4-25-88 at 844 F.2d 1261, had previously been before this court as reported at 752 F.2d 1135 (1985). Both times, this court was considering a summary dismissal of plaintiff's case on the basis of an immunity defense. The recent decision seems to require

that a defendant moving for summary judgment on the basis of a good faith immunity defense must introduce "affidavits in the District Court from him and his attorney stating that he acted solely on the advice of his attorney" (844 F.2d 1267, 1268). Applying this logical rule to the record on these appeals, there are no affidavits from any of the defendants or attorneys from Arter & Hadden that any or all of them were acting "in good faith" when seeking out the participation of the county prosecutor for the actions leading to destruction of plaintiff and his company as business competitors.

The purpose of the evidentiary rule of *Duncan v. Peck* (II) may become significant for this Court to determine applicability of the "sham exception" against grant of Noerr-Pennington for immunity (if such a defense remains after *Patrick v. Burget* and *Allied Tube*).

Prosser on Torts

This citation is made to enhance the arguments made in the blue cover brief for Appeal '3378 regarding the district courts' misinterpretation of the tort abuse of process.

> Abuse of process differs from malicious prosecution in that the gist of the tort is not commencing an action or causing process to issue without justification, but misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish. The purpose for which the process is used, once it is issued, is the only thing of importance. Consequently in an action for abuse of process it is unnecessary for the plaintiff to prove that the proceeding has terminated in his favor, or that the process was obtained without probable cause or in the course of a proceeding begun without probable cause.
>
> . . . ¶

> The essential elements of abuse of process, as the tort has developed, have been stated to be: first, an ulterior purpose, and second, a wilful act in the use of the process not proper in the regular conduct of the proceeding.

[14] *Two Supreme Court decisions relating to the Second and Third Counts*

Patrick v. Burget is the first of two new cases dealing with a judicially created immunity for anticompetitive conduct. A jury award and district court trebling of $650,000 damages on Sherman Act claims, was reinstated over a reversal by the Ninth Circuit.

The unanimous Supreme Court presented the question as whether the state-action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), protects physicians in the State of Oregon from federal antitrust liability for their activities on hospital peer-review committees. The Ninth Circuit said it did, the United States Supreme Court said it did not.

The Supreme Court reaffirmed "[A] rigorous two-pronged test to determine whether anticompetitive conduct engaged in by private parties should be deemed state action and thus shielded from the antitrust laws .... First, 'the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy" ' .... Second, the anticompetitive conduct 'must be "actively supervised" by the State itself.' " (56 U.S.L.W. at 4431).

The Supreme Court concluded that the case at bar "does not require us to decide the broad question whether judicial review of private conduct ever can constitute active supervision, ..." (56 U.S.L.W. at 4432).

The defendants may argue that the role played by the State Court judge, from the plea of not guilty in 1982 to the bargained plea of guilty in 1984, was "active supervision." However, such argument would be capricious.* As best said for defendants, the proceedings supervised by the Ohio court were prosecutorial, without trial and summary in disposition of pretrial motions for the defendants there—plaintiffs here—who never confessed but were coerced.

[15] The second Supreme Court case, *Allied Tube,* resulted in affirmance of *Indian Head, Inc. v. Allied Tube & Conduit Corp.* (817 F.2d 938), cited in the blue cover brief for Appeal '3657. Plaintiffs offered a summation of the federal law on the *Noerr-Pennington* doctrine by direct quotation of the Second Circuit (from 817 F.2d at 942) on brief pages 7-9.

In Allied Tube & Conduit v. Indian Head, Inc. the petitioner contended that its efforts to affect the product standard-setting process of a private association are immune from antitrust liability under the *Noerr* doctrine primarily because the association's standards were widely adopted into law by state and local governments. The Second Circuit said it did not. The United States Supreme Court also said it did not.

Justice Brennan writing for a 7-2 majority in *Allied Tube* begins with review of facts proven by the jury trial. The jury instructions, answers to special interrogatories and the jury's special findings were each considered.

Part II of the Opinion begins with a mandate—The scope of this [*Noerr-Pennington*] protection depends, however, on the source, context, and nature of the

* Such an argument also disregards the State Court judge's order ". . ., that the proceedings in this case shall be deemed not to have occurred . . . ." See, plaintiffs' Exh. 300, App. 455.

anticompetitive restraint at issue (56 U.S.L.W. 4540). In these instant appeals, the district court has focused exclusively on a single act by the plaintiff person (the result of the coerced plea-bargain agreement, occurring on January 13, 1984) and has made no finding nor reached any conclusion as to the source, context, and nature of the anticompetitive restraints by defendants at issue—the conspiracies and actions from mid-year 1981 to at least March 13, 1987.

The irony present in these appeals is that the district court could have determined (under the *Vodila* authority) what *plaintiff* had the legal right to *think* for statute of limitation purposes—but it did not! The district court should not have accepted (under the *Allied Tube* authority) what the *plaintiff* did in relation to the antitrust counts—but it did!

[16] *A recent Supreme Court action bearing on Issue I in Appeal '3657*

The second appeal focuses on the antitrust immunity created for defendant Lawrence K. Hubbell *sua sponte* by the district court.

Plaintiffs Exhibit 48-4 (App. 145, 146) demonstrates the intent of Mr. Hubbell, as president of plaintiff's vendor Royalton Manufacturing Inc., to go along with Ed Niam of Niam Investigations and Ed Kavanagh of C-E Cast Equipment. There was no allegation in the complaint, nor has any evidence been discovered, that defendant Hubbell had any involvement with a county prosecutor.

In the blue cover (and only) brief for Appeal '3657, the decision *In re Burlington Northern, Inc.* (822 F.2d 518) is referenced on pages 10, 11, and 16. The Fifth

Circuit decision is analyzed, quoted and put forth in summation as to Issue I—

> The Fifth Circuit in *Burlington* illuminates the characterization of Hubbell as a "bystander" or "assister" to the other ten defendants—one who has no standing to claim Noerr-Pennington immunity. The legal questions touched by the Ninth and Fourth Circuits, in *Forro* and *Ottensmeyer,* require that this Court should have had the benefit of a district court trial on "why" defendant Hubbel did what he did and, if deemed necessary, "what" was done and "where" he did it before reviewing a dismissal of the merits of plaintiffs' case.

On January 11, 1988, the Supreme Court denied review.

Counsel for appellant in these appeals suggests that the Supreme Court appreciated the bottom line result in *Burlington Northern* and therefore denied review; well knowing that it had previously decided* to take up the policy considerations underlying antitrust immunity in the *Patrick v. Burget* and *Allied Tube* cases.

[17] *Sessions Tank Liners, Inc. v. Joor Mfg., Inc.*

This decision from Ninth Circuit (decided 9-2-87) is a Noerr-Pennington case involving lobbying a model fire code for underground gas storage tanks. The district court favored the defendant as immune from antitrust liability and granted summary judgement; the circuit court affirmed in part but reversed and remanded in part. Both sides have petitioned for certiorari (Sessions in No. 87-687 and Joor in No. 87-916). As a Ninth Circuit decision, without reference to pending certiorari, the case is cited in footnote 10 of the majority opinion in *Allied Tube & Conduit* (56 U.S.L.W. at 4543) and in the dissent.

---

* Review for both granted 10-5-87, 56 U.S.L.W. 3242.

Having read both *Patrick v. Burget* and *Allied Tube,* counsel for appellants in these appeals are of the opinion that the Supreme Court, having known that plaintiff Sessions has been given a remand for trial, with opportunity for a full record, will deny certiorari in both No. 87-687 and No. 87-916; or grant certiorari in No. 87-687 and remand for trial in light of its decision in *Allied Tube.* Either way, the result of Supreme Court action will favor plaintiffs' appeal.

Respectfully submitted,

/s/ REBECCA H. COOK

RHC:pha
cc: Walter Bates, Esq.
James J. Dyson, Esq.
William A. Hamann, Jr.

PETITIONERS' LETTER DATED MARCH 1, 1987 TO DISTRICT COURT CITING WESTMAC, INC. V. SMITH, 797 F.2d 313 (6TH CIR. 1986) AND GRIP-PAC, INC. V. ILLINOIS TOOL WORKS, INC., 694 F.2d 466 (7TH CIR. 1982)

COOK & COOK
Attorneys At Law
900 First National Tower
Akron, Ohio, U.S.A. 44308

MACK D. COOK, II

Telephone 376-1005
Area Code 216
Telex 986376
Answerback: Propright AKR

March 1, 1987

Hon. David D. Dowd, Jr.
United States District Court
Northern District of Ohio
Federal Building, U.S. Courthouse
2 South Main Street
Akron, Ohio 44308

Re: *Lester W. Smith, et al*
vs.
Combustion Engineering, Inc. et al
C85-3451A

Dear Judge Dowd:

This Court currently has pending a—

REQUEST FOR RECONSIDERATION OF THE MEMORANDUM OPINION AND JUDGMENT ENTRY (1-21-87) DISMISSING SECOND AND THIRD COUNTS (ANTITRUST)

filed 1-30-87 on behalf of the plaintiffs and signed by the undersigned attorney.

The purpose of this communication is to respectfully advise this Court of citations of law and authorities which we consider relevant to the *Noerr-Pennington* doctrine, as previously argued for the parties and as considered by this Court.

With all respect, we cite to this Court:

Westmac, Inc. v. Smith, 797 F.2d 313, at 320-323 (6th Cir. 1986) *cert. denied*, _____ U.S. _____, _____ S.Ct. _____, 98 L.Ed.2d 838 (1987);

Grip-Pac, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466 (7th Cir. 1982) *cert. denied*, 461 U.S. 958, 103 S.Ct. 243, 77 L.Ed.2d 1317 (1983).

Westmac is cited for the logic and law of the *dissent* by Circuit Judge MERRITT.

Grip-Pac is cited for the logic and law of the unanimous opinion by Circuit Judge POSNER, for a panel including Senior Circuit Judge WEICK of the Sixth Circuit.

By way of explanation, not as an excuse for late citation of *Westmac* and *Grip-Pac*, the undersigned attorney has been assisting the lead attorney for the plaintiffs in the prosecution of the case at bar. (A disability of Mack D. Cook, II, is explained in a Motion For Enlargement of Time to Respond to Defendants' Motion for Summary Judgment, filed 7-11-86, Dkt. Nr. 76 and granted 7-14-86, Dkt. Nr. 77. The referenced physical disability has, unfortunately, been of a continuing nature; but Mack Cook has been available for consultation with the undersigned attorney.) This assistance has been available only on a limited (primarily, a Saturday and Sunday) basis and therefore the results of our legal research and the finding of *Westmac* and *Grip-Pac* was not completed until today.

The undersigned attorney respectfully argues that the logic and law of the dissent in *Westmac, Inc.*, being in the Sixth Circuit can well persuade this Court to further reconsider and amend the MEMORANDUM OPINION and JUDGMENT ENTRY filed January 21, 1987, and to deny to the ten defendants a summary judgment dismissing Counts II and III of the Complaint.

The undersigned attorney herewith certifies that a copy of this letter will have been mailed no later than Monday, March 2, 1987, to Walter A. Bates, Esq., 1100 Huntington Building, Cleveland, Ohio 44115, Attorney for the ten related Defendants other than Lawrence K. Hubbell, and to William A. Hamann, Jr., Esq., 24549 Detroit Road, Westlake, Ohio 44145 and to James J. Dyson, Esq., Brainard Place, 29001 Cedar Road, Cleveland, Ohio 44124, both Attorneys for Lawrence K. Hubbell.

Respectfully submitted,

/s/ REBECCA HAZELETT-COOK
Attorney for Plaintiffs

RHC:rhc

LETTER ON BEHALF OF RESPONDENTS COMBUSTION ENGINEERING DATED MARCH 12, 1987, RESPONDING TO PETITIONERS' LETTER OF MARCH 1, 1987 AND DEFINING A CONFLICT BETWEEN THE SIXTH AND SEVENTH CIRCUIT ON IMMUNITY UNDER THE NOERR-PENNINGTON DOCTRINE

In Canton
ARTER & HADDEN
640 Citizens Savings Building
Canton, Ohio 44702
216/453-1166
Telecopier 216/453-2364

In Dallas
ARTER, HADDEN & WITTS
5353 Renaissance Tower
Dallas, Texas 75270
214/741-7561
Telecopier 214/741-7139

1100 Huntington Building
Cleveland, Ohio 44115
216/696-1100
Telecopier 216/696-2645
Telex 98 5384

In Columbus
ARTER & HADDEN
180 East Broad Street,
Fourth Floor
Columbus, Ohio 43215
614/221-3155
Telecopier 614/221-0479

In Washington
ARTER & HADDEN
1919 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
202/775-7100
Telecopier 202/857-0172
Telex 6502156242 MCI

Please Respond to:
Cleveland

March 12, 1987

The Honorable David D. Dowd, Jr.
United States District Court
Northern District of Ohio
Federal Building, U.S. Courthouse
2 South Main Street
Akron, Ohio 44308

Re: *Lester Smith, et al. v.*
Combustion Engineering, Inc., et al.
Case No. C85-3451A

Mr. dear Judge Dowd:

On March 4, 1987, as counsel for the Combustion Engineering defendants, I received correspondence from plaintiffs' counsel raising, purportedly for the first time, two opinions discussing the applicability of the *Noerr-Pennington* doctrine to certain situations.

This most recent correspondence is the fourth written communication by plaintiffs' counsel to this Court concerning this issue, including a Brief in Opposition to Defendants' Motion for Summary Judgement, a "Further Answer Brief," and a pleading captioned a "Request for Reconsideration." With all respect to plaintiffs' counsel, this latest letter does not contribute to the resolution of this matter and, in point of fact, does not raise authority having any bearing whatever on this controversy.

The Combustion Engineering defendants cited and relied upon *Westmac, Inc. v. Smith*, 797 F.2d 313 (6th Cir. 1986), at pages 9 and 12 through 14 of their Reply Brief in Support of Motion for Summary Judgment. Indeed, in footnote 10 on page 13 of that brief, these defendants even made reference to Judge Merritt's dissenting opinion, which plaintiffs' counsel cite in their letter. Particularly in light of the subsequent Sixth Circuit opinion in *Potters Medical Center v. City Hospital Association*, 800 F.2d 568 (6th Cir. 1986), reaffirming the application of the *Noerr-Pennington* doctrine in cases such as this, it cannot be said that Judge Merritt's dissent states the law in this jurisdiction.

On equal footing is the Seventh Circuit's decision in *Grip-Pac, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466 (7th Cir. 1982), *cert. denied*, 461 U.S. 958 (1983), a case in

which the defendant had brought a series of unsuccessful lawsuits against the plaintiff. Not only is *Grip-Pac* distinguishable on its facts, it also does not state the law in this jurisdiction in as much as the majority in *Westmac* rejected the reasoning of *Grip-Pac*. Based upon the Sixth Circuit's unanimous opinion in *Potters Medical*, a case much more analogous to the present one than *Grip-Pac*, the Combustion Engineering defendants' actions were immune from liability under the *Noerr-Pennington* doctrine.

This Court correctly decided on January 27, 1987, that plaintiffs' claims herein are barred under the *Noerr-Pennington* doctrine. Plaintiffs' late reliance on inapplicable authority from another jurisdiction and a single dissent from the Sixth Circuit provides no basis to change that conclusion. Defendants therefore respectfully request that plaintiffs' "Request for Reconsideration" be denied.

Respectfully submitted,

WALTER A. BATES

WAB:dm

cc: Mack D. Cook, II, Esq.
Rebecca Hazelett-Cook, Esq.
James J. Dyson, Esq.

PETITIONERS' COMPLAINT FILED NOVEMBER 18, 1985 IN DISTRICT COURT

Case No.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LESTER W. SMITH

and

WESTERN RESERVE GROUP, INC.,
c/o Lester W. Smith, President,
Plaintiffs,

vs.

COMBUSTION ENGINEERING, INC., C-E CAST EQUIPMENT, JAMES F. CALVERT, GEORGE E. FISHER, JR., LAWRENCE K. HUBBEL, EDWIN M. KAVANAGH, JAMES B. KELLY, JAMES E. KLIMA, c/o VETCO-GRAY, THOMAS E. McGRANAHAN, c/o C-E CAST EQUIPMENT, WILLIAM FRANCIS ROCHE, ARTHUR J. SANTRY, JR., c/o COMBUSTION ENGINEERING, INC., FG DOE, EN ROE, JB LOE,
Defendants.

COMPLAINT
CIVIL RIGHTS AND ANTITRUST VIOLATIONS

DEMAND FOR JURY TRIAL
ENDORSED HEREON

ALLEGATIONS OF JURISDICTION

1. This action is brought under Title 15 U.S.C. §22, and Title 28 U.S.C. §1331, §1332 and §1343.

2. This action is timely filed by virtue of Title 15 U.S.C. §15b and Ohio Revised Code §2305.09 (four year statutes of limitation).

ALLEGATIONS AS TO THE PARTIES

3(a). Plaintiff Lester W. Smith is a citizen of the State of Ohio and on December 8, 1981 was the owner and occupant, together with Mrs. Patricia Smith, of a home and residential dwelling at 310 Simon Road, Hudson (Summit County) Ohio 44236; and now still resides at said address.

(b). In 1981, Lester W. Smith, by reason of formal education and extensive work experience, was well qualified to function as a manager of or as a consultant or advisor to a company doing business in the metal-working industry, including a company doing business in the design, manufacture and sale of foundry machines and equipment and of replacement parts therefor.

(c). During 1970-1976, Lester W. Smith functioned as Vice President and General Manager of defendant C-E Cast Equipment, and when he left the company he was not subject to a noncompetition covenant.

(d). During 1977, Lester W. Smith functioned as Vice President—European Operations, the Herman Corporation, Zelienople, Pennsylvania, a competitor of defendant C-E Cast Equipment in the design, manufacture and sale of foundry machines and equipment and of replacement parts therefor.

(e). In 1978, Lester W. Smith returned to work in the Cleveland-Akron area as Vice President and General Manager, the H.K. Ferguson Company, Hale and Kullgren Division, Akron, Ohio, an Architect/Engineer, Construction/Construction Management firm providing consulting services for domestic and international clients.

(f). During May, 1978, Lester W. Smith to further improve his personal financial situation decided to draw on his experience as a manager of or as a consultant or advisor to a company doing business in the design, manufacture and sale of foundry machines and equipment and of replacement parts therefor and became a shareholder in, and a Director and President of the company which is now known as plaintiff, Western Reserve Group, Inc.

4(a). Plaintiff Western Reserve Group, Inc. was incorporated as an Ohio Corporation in May, 1978 as Western Reserve Parts, Inc.; the name of said plaintiff was changed to Western Reserve Group, Inc. in June, 1978; and the primary business purpose of said plaintiff, as set forth in the Articles of Incorporation was—

> To engage in buying, selling, leasing and production by manufacture or otherwise of foundry machines and equipment and of replacement parts, machines and equipment of every nature and description related to the foundry industry, and to do and perform all things incidental or necessary to the purposes above set forth;

(b). Lester W. Smith, is President of plaintiff Western Reserve Group, Inc. and is now duly authorized to speak for and represent said corporation in this action.

(c). In 1981, plaintiff Western Reserve Group, Inc. had an office and principal place of business at 310 Simon Road, Hudson (Summit County) Ohio, 44326.

5. Defendant Combustion Engineering, Inc. is a corporation, with corporate headquarter offices at 900 Long Ridge Road, Stamford, Connecticut 06902.

6(a). Defendant C-E Cast Equipment, located at 7887 Hub Parkway, Cleveland (Valley View) Ohio 44125, is a division of defendant Combustion Engineering, Inc.

6(b). Defendant C-E Cast Equipment manufactures foundry molding and related equipment and replacement parts for such equipment, for industries such as the automotive and heavy equipment industries, and for customers such as Ford Motor Company, General Motors, Chrysler, International Harvester, John Deere and Caterpillar.

7. Defendant James F. Calvert was Vice President—Operations of defendant Combustion Engineering, Inc. in 1981 and retired from Combustion Engineering, Inc. at the end of 1983.

8. Defendant George E. Fisher, Jr. was Manager of Customer Service for defendant C-E Cast Equipment in 1981.

9. Defendant Lawrence K. Hubbel was President of Royalton Manufacturing, Inc., located at 12166 York Road, Cleveland (North Royalton) Ohio, 44133, in 1981.

10. Defendant Edwin M. Kavanagh was Vice President—Replacement Parts Division of defendant C-E Cast Equipment from 1978 to at least October 7, 1982.

11. Defendant James B. Kelly was an officer of defendant Combustion Engineering, Inc. in 1981 and is now Vice President in charge of Industrial Group of Combustion Engineering, Inc.

12. Defendant James E. Klima was Vice President and Comptroller of defendant C-E Cast Equipment in 1981.

13. Defendant Thomas E. McGranahan was employed by defendant C-E Cast Equipment in 1975 and in 1981 was a senior sales coordinator, or sales representative, for defendant C-E Cast's Replacement Parts Division.

14. Defendant William Francis Roche was President of defendant C-E Cast Equipment from early 1975 on through until about the first of April 1982 and is now President of Basic Incorporated which is a wholly owned subsidiary of defendant Combustion Engineering, Inc.

15. Defendant Arthur J. Santry, Jr., was President of defendant Combustion Engineering, Inc. in 1981 and has been the chairman of the Board of Combustion Engineering, Inc. since April 24, 1984.

16. Defendant FG Doe had an office in Cleveland, Ohio in 1981.

17. Defendant EN Roe had an office in Akron, Ohio in 1981.

ALLEGATIONS COMMON TO ALL COUNTS

18. At the times made relevant by the allegations set forth below, the defendants James F. Calvert and/or James B. Kelly and/or Arthur J. Santry, Jr., as business persons and as officers of defendant Combustion Engineering, Inc., did have corporate control of and personal accountability for the conduct and acts of defendants James E. Klima, Edwin M. Kavanagh and William Francis Roche, as business persons and as officers of defendant C-E Cast Equipment.

19. Sometime in early 1981, at a date plaintiffs have not yet determined, defendant Edwin M. Kavanagh made an internal investigation within defendant C-E Cast Equipment and learned that Defiance, Illinois Central Foundry, which is a division of General Motors, had contacted C-E Cast Equipment indicating that they would not be buying their normal regular replacement parts from C-E Cast Equipment, because they had found an outside supplier who would provide most of the replacement parts at a reduced price.

20. On or about August 6, 1981, at the suggestion of a person or persons in the corporate organization of defendant Combustion Engineering, Inc., whose specific identity is as yet unknown but is believed by plaintiff Lester W. Smith to be one or more of the defendants, James F. Calvert, James B. Kelly and Arthur J. Santry, Jr., defendant Edwin M. Kavanagh signed a contract to hire on behalf of defendant C-E Cast Equipment a private investigation firm, Niam Investigations, 277 South Broadway, Akron, Ohio 44308 to conduct the balance of the investigation.

21. After August 6, 1981, said Niam Investigations reported to defendants Edwin M. Kavanagh, William Francis Roche and James E. Klima.

22. At sometime after August 6, 1981 and prior to December 7, 1981, defendant Edwin M. Kavanagh did cause said Niam Investigations to make an investigation at the home and residence of plaintiff Lester W. Smith in Hudson, Ohio, including a search and examination of garbage disposed of at the Lester W. Smith home.

23. The investigation of plaintiff The Western Reserve Group, Inc. that began in 1981 was under the leadership of and with the very definite approval of defendant William Francis Roche, who was consulted and agreed with the decision to retain said Niam Investigations.

24. At all times relevant to this action, the investigation by said Niam Investigations of the business activities of plaintiffs was a licensed activity under color of state law; Ohio Revised Code Chapter 4749, Private Investigators.

25. In 1981, Royalton Manufacturing, Inc. was physically producing parts to be sold by plaintiff Western Reserve Group, Inc. in competition with defendant C-E Cast Equipment; and on or after September 10, 1981, defendant Edwin M. Kavanagh did ask for and defendant Lawrence K. Hubbel did willingly provide to defendant C-E Cast Equipment documents and sales records relating to the business activities of Western Reserve Group with Royalton Manufacturing: Including over seventy detailed drawings; copies of Western Reserve Group purchase orders with quantity and purchase price information; Royalton Manufacturing invoices with quantity and delivery price information; and copies of checks that were signed by a Lester W. Smith.

26. Thereafter, as to the checks received from Royalton Manufacturing, Inc., defendant Edwin M. Kavanagh took documents from the files of defendant C-E Cast Equipment and had a technical specialist, a Dr. Bouffard, identify that the handwriting did belong, to the best of his knowledge, to plaintiff Lester W. Smith.

27. At sometime after August 6, 1981 and prior to December 7, 1981, defendant Edwin M. Kavanagh and a person from Niam Investigations did go to the office of Frank C. Gasper, an assistant county prosecutor in the office of John T. Corrigan, Prosecutor for Cuyahoga County, in Cleveland, Ohio.

28. At sometime prior to December 7, 1981, several identical affidavits were prepared by prosecutor Frank C. Gasper for the signature of defendant Edwin M. Kavanagh: Said affidavits being based solely or completely based upon information conveyed to or provided by defendant Edwin M. Kavanagh and a person from said Niam Investigations.

29. Paragraphs 9 A and C of said affidavits are based upon incorrect [and] misleading information in a sworn statement of defendant Thomas E. McGranahan given, at a date as yet unknown to plaintiffs, to defendant Edwin M. Kavanagh and one or more attorneys, whose names are as yet unknown to plaintiffs, with the law firm of Arter & Hadden, now at 1100 Huntington Building, Cleveland, Ohio 44115.

30. One of said affidavits was signed by defendant Edwin M. Kavanagh in the presence of a Judge, Court of Common Pleas, Summit County, on December 7, 1981 as establishing the grounds for issuing a search warrant pursuant to Ohio Rules of Criminal Procedure, Rule 41.

31. On December 7, 1981, it was the intention or purpose or objective of defendant Edwin M. Kavanagh that all of the property of plaintiff Western Reserve Group, Inc., then within the home and residence of plaintiff Lester W. Smith be seized on behalf of defendant C-E Cast Equipment.

32. A search within the home and residence of plaintiff Lester W. Smith was made in the early morning of December 8, 1981 and property belonging to Lester W. Smith and plaintiff Western Reserve Group, Inc. was seized and taken away, never to be returned by defendant Edwin M. Kavanagh or anyone.

33. Subsequent to said search and seizure, defendant Edwin M. Kavanagh and/or person from Niam Investigations arranged for or procured extensive media reporting and coverage as to the allegations of defendant C-E Cast Equipment against plaintiffs Lester W. Smith and personnel of Western Reserve Group, Inc.; said media reporting and coverage began on December 8, 1981 with the 6:00 PM TV Channel 3 news showing the home and residence of Lester W. Smith, and continued

with a variety of stories in the print media and climaxed with the 6:00 PM and 11:00 PM TV Channel 3 news on January 13, 1984 showing Lester W. Smith in the Court of Common Pleas, Cuyahoga County, Ohio, and followed by stories in the print media on January 14, 1984.

FIRST COUNT

34. This count generally states a cause of action against the defendants herein for tortious conduct and acts in concert or conspiracy with persons acting under color of state law and involving: A trespass upon real property owned by plaintiff Lester W. Smith; a taking and detaining of personal property owned by Lester W. Smith and plaintiff Western Reserve Group, Inc.; and an injury to the civil rights of Lester W. Smith and Western Reserve Group, Inc.

35. This count specifically states a cause of action against the defendants herein, for tortious conduct and acts in concert or conspiracy with persons acting under color of state law and arising under Title 42 U.S.C. §1983 reading in relevant part—

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State. . ., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law—;

plaintiff Lester W. Smith being a "citizen"; plaintiff Western Reserve Group, Inc. being an "other person."

36. An affidavit signed by defendant Edwin M. Kavanagh December 7, 1981 was the sole and only basis and reason for a search warrant given by a Judge, Court of Common Pleas, Summit County, Ohio, on December 7, 1981, 3:18 PM.

37. Said affidavit was defective because it was in violation of AMENDMENT IV to the United States Constitution—

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized—;

and contrary to the relevant part of Ohio Rules of Criminal Procedure, Rule 41(C)—

> A warrant shall issue . . . only on an affidavit . . . sworn to before a judge . . . and establishing the grounds for issuing the warrant. The affidavit shall name or describe the person to be searched or particularly describe the place to be searched, name or describe the property to be searched for and seized, state substantially the offense in relation thereto, and state the factual basis for the affiant's belief that such property is there located . . .

38. Said search warrant was improperly issued because said affidavit was defective.

39. Said improperly issued search warrant was directed to various law enforcement officers including the person Det. Sgt. Larry Momchilov, a member of the Sheriff's Department for Summit County, Ohio.

40. Said improperly issued search warrant was served and executed on plaintiff Lester W. Smith at his home land residence 310 Simon Road, Hudson, Ohio by Det. Sgt. Larry Momchilov, at 7:05 AM December 8, 1981.

41. An unreasonable search for and seizure of the property of plaintiffs Lester W. Smith and Western Reserve Group, Inc. located within the house and garage

at 310 Simon Road, Hudson, Ohio made without the consent of Lester W. Smith was carried out by a search team lead by Det. Sgt. Larry Momchilov and comprising: Defendant George E. Fischer, Jr.; a person Edward Niam from Niam Investigations; and a person named Cheryl Lehman from Niam Investigations.

42. When said search term entered his house at 7:05 AM on December 8, 1981, Lester W. Smith recognized a T.V. Channel 3 Minicam vehicle or van at the end of the driveway.

43. Said search team left the house of plaintiff Lester W. Smith at about 11:15 AM December 8, 1981 and took with them several boxes or plastic bags containing at least sixty seven (67) categorized items of documents and records: At least twenty one (21) of said categorized items being of a nature personal to Lester W. Smith or unrelated to the business activities of Western Reserve Group, Inc.

44. By virtue of Title 42 U.S.C. §1988 the allegations of this Count also state a violation of the Constitution of the State of Ohio, Article I §1, Inalienable Rights—

> All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety—;

and Article I §14, Search Warrants—

> The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the person and things to be seized.

45. For the reasons set forth in the specific allegations of this Count, and by general allegations elsewhere in this Complaint, plaintiffs Lester W. Smith and Western Reserve Group, Inc. have been injured as to their civil rights and property and they now claim an award of damages, actual and punitive, pursuant to Title 42 U.S.C. §1983 and an allowance of a reasonable attorney's fee as part of the costs pursuant to Title 42 U.S.C. §1988.

SECOND COUNT

46. This Count generally states a cause of action on behalf of plaintiff Western Reserve Group, Inc. arising under Sections 1 and 2 of the Sherman Act, Title 15 U.S.C. §§1 and 2, and the antitrust laws of the United States.

47. With reference to ¶¶'s 18, 19, 20 and 21 above, acting on behalf of defendants Combustion Engineering, Inc. and C-E Cast Equipment, the defendants Edwin M. Kavanagh, William Francis Roche or James E. Klima did enter into a contract with said Niam Investigations with a specific intent to acquire monopoly power in restraint of trade and to control price and to foreclose competition in the United States for products in the relevant market and the actual market, as defined in ¶¶'s 51 and 52 below.

48. With reference to ¶25 above, acting on behalf of defendants Combustion Engineering, Inc. and C-E Cast Equipment, the defendants Edwin M. Kavanagh and Lawrence K. Hubbel did conspire with a specific intent to acquire monopoly power in restraint of trade and to control price and to foreclose competition in the United States for products in said relevant market and said actual market.

49. With reference to ¶¶27, 28, 29 and 30 above, acting on behalf of defendants Combustion Engineering, Inc. and C-E Cast Equipment, the defendant Edwin M. Kavanagh did conspire with said prosecutor Frank C. Gasper with a specific intent to acquire monopoly power in restraint of trade and to control price and to foreclose competition in the United States for products in said relevant market and said actual market.

50. Additionally or in the alternative, on behalf of defendants Combustion Engineering, Inc. and C-E Cast Equipment, the conduct and acts of persons named as defendants herein, or as otherwise named, were deliberate and with the general intent or purpose to possess or attempt to possess monopoly power in said relevant market and said actual market and to maintain that monopoly power by willful acquisition as distinguished from growth or development as a consequence of a superior product, business accumen, or historical accident.

51. The relevant market in trade or commerce within the United States is replacement parts, also known as wear parts, further known as spare parts, for each line or collection of foundry molding and related equipment manufactured and sold by defendants Combustion Engineering, Inc. and C-E Cast Equipment to customers.

52. The actual market for said replacement parts are the owners of at least one hundred and thirty five (135) lines or collections of foundry molding and related equipment which had been manufactured and sold by defendant C-E Cast Equipment to customers as of 1980; of which lines approximately eighty percent (80%) were operational in 1982.

53. In 1981, plaintiff Western Reserve Group, Inc. was a direct competitor of defendant C-E Cast Equipment in said relevant market and said actual market.

54. In 1981, the defendant William Francis Roche knew that the individuals working for plaintiff, Western Reserve Group, Inc. were competing with defendant C-E Cast Equipment and were trying to sell to the same customers.

55. The conduct and acts of persons named as defendants herein, or as otherwise named, have on December 8, 1981 occasioned or caused the office of Lester W. Smith, President of plaintiff Western Reserve Group, Inc. to be subjected to a search and seizure.

56. On December 8, 1981, it was the intention or purpose or objective of defendant Edwin M. Kavanagh that virtually all of the property of plaintiff Western Reserve Group, Inc. be seized by a search of the office of Lester W. Smith and by searches and seizures at other locations on the same day.

57. After virtually all the property of plaintiff Western Reserve Group, Inc. was seized on December 8, 1981, said property was delivered into the custody of said Frank C. Gasper, the assistant prosecutor of Cuyahoga County, so that it was impossible for anyone to continue to conduct the business of Western Reserve Group, Inc. in competition with defendants Combustion Engineering, Inc. and C-E Cast Equipment.

58. The conduct and acts of persons named as defendants herein, or as otherwise named, has totally or completely destroyed the business of plaintiff Western Reserve Group, Inc. as an active or viable competitor of

defendants Combustion Engineering, Inc. and C-E Cast Equipment in said relevant market and said actual market.

59. For the reasons set forth in the specific allegations of this Count, and by general allegations elsewhere in this Complaint, plaintiff Western Reserve Group, Inc. has had injury inflicted upon its business and property and it now claims an award for recovery of threefold the damages by it sustained, and the cost of suit, including a reasonable attorney's fee pursuant to Title 15 U.S.C. §15.

THIRD COUNT

60. This Count states a cause of action on behalf of plaintiff Lester W. Smith, as a person and not as a shareholder in or as a Director and President of plaintiff Western Reserve Group, Inc.

61. This Count states a cause of action arising under Sections 1 and 2 of the Sherman Act, Title 15 U.S.C. §§1 and 2, and the antitrust laws of the United States.

62. The relevant market in trade or commerce within the United States is the ability of plaintiff Lester W. Smith to function as a manager of or as a consultant or advisor to a company doing business in the design, manufacture and sale of foundry machines and equipment and of replacement parts therefor: The ability of Lester W. Smith to offer and perform "personal services."

63. With references to ¶¶'s 18, 19, 20, 21 and 22 above, acting on behalf of defendants Combustion Engineering, Inc. and C-E Cast Equipment, the defendants Edwin M. Kavanagh, William Francis Roche

and James E. Klima did enter into a contract with said Niam Investigations with a specific intent to acquire monopoly power in restraint of trade and to control the ability of plaintiff Lester W. Smith to function in said relevant market.

64. With reference to ¶¶'s 25 and 26 above, acting on behalf of defendants Combustion Engineering, Inc. and C-E Cast Equipment, the defendants Edwin M. Kavanagh and Lawrence K. Hubbel did conspire with a specific intent to acquire monopoly power in restraint of trade and to control the ability of plaintiff Lester W. Smith to function in said relevant market.

65. With reference to ¶¶'s 27, 28, 29 and 30 above, acting on behalf of defendants Combustion Engineering, Inc. and C-E Cast Equipment, the defendant Edwin M. Kavanagh did conspire with said prosecutor Frank C. Gasper with a specific intent to acquire monopoly power in restraint of trade and to control the ability of plaintiff Lester W. Smith to function in said relevant market.

66. Additionally or in the alternative, on behalf of defendants Combustion Engineering, Inc. and C-E Cast Equipment, the conduct and acts of persons named as defendants herein, or as otherwise named, were deliberate and with the general intent or purpose to possess or attempt to possess monopoly power to control the ability of plaintiff Lester W. Smith to function in said relevant market and to maintain that monopoly power by willful acquisition.

67. With reference to ¶32 above, the conduct and acts of persons named herein, or as otherwise named, have on December 8, 1981 caused the home and residence of plaintiff Lester W. Smith to be raided.

68. With reference to ¶33, above, there was extensive media reporting and coverage about and concerning plaintiff Lester W. Smith in the time period from December 8, 1981 to January 14, 1984.

69. Sometime after December 8, 1981 and prior to January 13, 1982, a person Richard R. Edmister, Esq. now general counsel for H.K. Ferguson Co., One Erieview Plaza, Cleveland, Ohio 44314, did speak with said Frank C. Gasper regarding a possible indictment of plaintiff Lester W. Smith by the Grand Jury of Cuyahoga County: On January 13, 1982, Lester W. Smith was discharged from employment at the H.K. Ferguson Co., Hale and Kullgren Division, Akron, Ohio.

70. In January, 1982, the said Frank C. Gasper at the urging of defendant Edwin M. Kavanagh and with the assistance of Edward Niam of Niam Investigations did appear before the Grand Jury of Cuyahoga County to give information pursuant to Ohio Revised Code §2939.10 and to obtain the indictment of plaintiff Lester W. Smith under Ohio Revised Code §2939.20: Said indictment having been Constitutionally defective and therefore null and void because evidence submitted by said Frank C. Gasper to said Grand Jury had been unlawfully or improperly seized.

71. On February 22, 1982, plaintiff Lester W. Smith did enter a plea of not guilty to four counts in said indictment: But because of media reporting and coverage prior to said not guilty plea, Lester W. Smith believed that there was no realistic or reasonable expectation of continuing, restoring or reviving his ability to function in said relevant market.

72. On January 13, 1984, plaintiff Lester W. Smith remained at peril under threat of the continually postponed trial on said four count indictment, he was

still awaiting ruling by a judge, Court of Common Pleas, Cuyahoga County, on motions to suppress evidence and to dismiss said indictment regarding which testimony and evidence had been presented to said Court during bifurcated hearings at various times between October 7, 1982 to December 20, 1982, he had no regular employment, his personal funds and assets available to further retain counsel for his defense were exhausted: So that Lester W. Smith had no other realistic or viable option than to accept coercive plea bargain arrangements that had been presented by said Frank C. Gasper, at the request of defendant Edwin M. Kavanagh or other persons, on behalf of defendants Combustion Engineering, Inc. and C-E Cast Equipment.

73. Said plea bargain arrangements included a document encaptioned Plea Agreement which read in relevant parts—

> (1) Lester Smith will be allowed to enter a plea of guilty to the lesser and included offense of Count III of the indictment, to wit: receiving stolen property of a value less than One Hundred Fifty Dollars ($150.00) in violation of Ohio Revised Code Section 2913.51. All other counts in the indictment will be nollied [sic] and dismissed.
>
> (2) The Court will accept a waiver of indictment submitted by Lester Smith on behalf of The Western Reserve Group, Inc. and will also accept a plea of guilty entered by Lester Smith to a one count information charging The Western Reserve Group, Inc. with a violation of Ohio Revised Code Section 1333.51.
>
> (3) The Court shall impose a sentence on Lester Smith of six months in the Cuyahoga County Jail and a One Thousand Dollar ($1,000.00) fine, imposition of the jail sentence shall be suspended and Lester Smith shall be placed on one year

probation. It shall be a condition of probation that Lester Smith will pay restitution in the amount of Twenty-Five Thousand Dollars ($25,000.00) directly to Combustion Engineering, Inc. or its designated agent; Five Thousand Dollars ($5,000.00) of which shall be payable on or before January 6, [sic] 1984 and the remaining Twenty Thousand Dollars ($20,000.00) shall be paid on or before January 6, [sic] 1984 as evidenced by a Promissory Note executed by Lester W. Smith.

(4) The Court shall impose a fine of Five Thousand Dollars ($5,000.00) on The Western Reserve Group, Inc.

74. As a calculated or direct and planned for benefit of ¶3 of said Plea Agreement, on behalf of defendants Combustion Engineering, Inc. and C-E Cast Equipment, defendant James B. Kelly was able to extend the monopoly power to control the ability of plaintiff Lester W. Smith to function in said relevant market to at least March 13, 1987: And probably thereafter for an appreciable period of years.

75. On March 13, 1984, on the letterhead of defendant Combustion Engineering, Inc., defendant James B. Kelly, sent a letter to plaintiff Lester W. Smith coercively offering to cancel the Promissory Note for $20,000, as called for in the last sentence of ¶3 of said plea bargain arrangement, as of March 13, 1987 if and in the event that Lester W. Smith would accept and agree to a noncompetition covenant.

76. Plaintiff Lester W. Smith had no viable option other than to accept said noncompetition covenant, which reads—

For a period of three (3) years ending upon the third anniversary of the date hereof, you agree that you will not, without C-E's prior written consent,

directly or indirectly, on a full or part time basis, or on a consulting or advisory basis, or otherwise, compete with, or aid any person, firm or corporation in any business activity which is competitive with C-E's foundry equipment and/or foundry products businesses as presently conducted by C-E's C-E Cast Equipment and C-E Cast Products Divisions.

77. For the reasons set forth in the specific allegations of this Count, and by general allegations elsewhere in this Complaint, plaintiff Lester W. Smith has had injury inflicted upon his business and property and he now claims an award for recovery of threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee pursuant to Title 15 U.S.C. §15.

PRAYER

I. Plaintiff Lester W. Smith demands judgment on the FIRST COUNT in the amount of $4,000,000.00 plus interest accrued and accruing thereon, plus costs and attorney's fees.

II. Lester W. Smith, on behalf of plaintiff Western Reserve Group, Inc., demands judgment on the FIRST COUNT in the amount of $1,000,000.00 plus interest accrued and accruing thereon, plus costs and attorney's fees.

III. Lester W. Smith, on behalf of plaintiff Western Reserve Group, Inc. demands judgment on the SECOND COUNT in the amount of $6,000,000.00 trebeled plus interest accrued and accruing thereon, plus costs and attorney's fees.

IV. Plaintiff Lester W. Smith demands judgment on the THIRD COUNT in the amount of $1,000,000.00 trebeled plus interest accrued and accruing thereon, plus costs and attorney's fees.

/s/ MACK D. COOK, II
900 First National Tower
Akron, Ohio 44308
(216) 376-1005
Attorney for Plaintiffs

of Counsel:
Rebecca Hazelett-Cook
900 First National Tower
Akron, Ohio 44308
(216) 376-1005

VERIFICATION

Lester W. Smith, says that he has read the allegations contained in the Complaint, and that they are true as he verily believes and to the best of his knowledge.

/s/ LESTER W. SMITH
310 Simon Road
Hudson, Ohio 44236

JURY DEMAND

Plaintiffs demand a trial by jury of any and all issues triable of right by a jury.

/s/ LESTER W. SMITH

PETITIONERS' AMENDED COMPLAINT FILED JULY 22, 1985

Case No. C85-3451A

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LESTER W. SMITH, *et al.*,
Plaintiffs,

vs.

COMBUSTION ENGINEERING, INC., *et al.*,
Defendants.

AMENDMENT TO THE COMPLAINT

ADDITIONAL ALLEGATIONS AS TO THE FIRST COUNT (COMPLAINT ¶¶s 34-45)

78. Beginning on December 8, 1981 and continuing to and until January 13, 1984, intentional acts and wrongful or offensive conduct of the defendants herein, in concert or conspiracy with persons acting under color of state law, did cause injury and damage to the civil rights of plaintiff Lester W. Smith in that:

(a) he suffered loss of employment and income;

(b) he paid expensive attorney's fees;

(c) he was the subject of public disgrace and humiliation;

(d) he was humbled into pleading guilty to a criminal offense; and,

(e) he was burdened by the psychological trauma of over two years of uncertainties.

79. The effects of the injury and damages to the civil rights of plaintiff Lester W. Smith as set forth in paragraph 78, above, have caused him to suffer enormously, have continued from January 13, 1984 to this date and will continue into the foreseeable future.

80. Because of the injury and damage to the civil rights of plaintiff Lester W. Smith as set forth in paragraph 78, above, his condition or state of mind prior to and on January 13, 1984 was not good but was bad.

LESTER W. SMITH
By /s/ MACK D. COOK, II
900 First National Tower
Akron, Ohio 44308
(216) 376-1005
Attorney for Plaintiffs

Of Counsel:

/s/ REBECCA HAZELETT-COOK
900 First National Tower
Akron, Ohio 44308
(216) 376-1005

VERIFICATION

Lester W. Smith, says that he has read the additional allegations, ¶¶'s 78, 79 and 80, in the foregoing AMENDMENT TO THE COMPLAINT, and that they are true as he verily believes and to the best of his knowledge.

/s/ LESTER W. SMITH
310 Simon Road
Hudson, Ohio 44236

15 U.S.C. §22

District in which to sue corporation

Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

(Oct. 15, 1914, c. 323, §12, 38 Stat. 736.)

20 U.S.C. §1331

Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

(June 25, 1948, ch 646, §1, 62 Stat. 930; July 25, 1958, P. L. 85-554, §1, 72 Stat. 415; Oct. 21, 1976, P. L. 94-574, §2, 90 Stat. 2721; Dec. 1, 1980, P. L. 96-486, §2(a), 94 Stat. 2369.)

28 U.S.C. §1332

Diversity of citizenship

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) Citizens of different States;

* * * * *

(June 25, 1948, ch 646, §1, 62 Stat. 930; July 26, 1956, ch 740, 70 Stat. 658; July 25, 1958, P. L. 85-554, §2, 72 Stat. 415; Aug. 14, 1964, P. L. 88-439, §1, 78 Stat. 445; Oct. 21, 1976, P. L. 94-583, §3, 90 Stat. 2891.)

28 U.S.C. §1343

Civil rights

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, ***

(June 25, 1948, c. 646, §1, 62 Stat. 932; Sept. 3, 1954, c. 1263, §42, 68 Stat. 1241; Sept. 9, 1957, P. L. 85-315, Part III, §121, 71 Stat. 637.)

15 U.S.C. §15b

Limitation of actions

Any action to enforce any cause of action *** shall be forever barred unless commenced within four years after the cause of action accrued.

(Oct. 15, 1914, ch 323, §4B, as added July 7, 1955, ch 283, §1, 69 Stat. 283; Sept. 30, 1976, P. L. 94-435, Title III, §302(1), 90 Stat. 1396.)

OHIO REVISED CODE §2305.09

Four years; certain torts

An action for any of the following causes shall be brought within four years after the cause thereof accrued:

(A) For trespassing upon real property;

(B) For the recovery of personal property, or for taking or detaining it;

* * * * *

(D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, inclusive, 2305.14 and 1304.29 of the Revised Code.

* * * * *

HISTORY: 129 v 13, eff. 7-1-62
1953 H 1; GC 11224

UNITED STATES CONSTITUTION

AMENDMENT 4

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

OHIO CONSTITUTION

ARTICLE I, §1

I §1 Inalienable rights

All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.

HISTORY: 1851 constitutional convention, adopted eff. 9-1-1851

OHIO CONSTITUTION, ARTICLE I §14

ARTICLE I §14

I §14 Search warrants

The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by

* * *

42 U.S.C. §1983

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

(R. S. §1979; Dec. 29, 1979, P. L. 96-170, §1, 93 Stat. 1284.)

42 U.S.C. §1988

§1988. Proceedings in vindication of civil rights

The jurisdiction in civil *** conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," *** for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause. . . .

* * *

(R. S. §722; Oct. 19, 1976, P. L. 94-559, §2, 90 Stat. 2641.)

OHIO REVISED CODE §4749.01

CHAPTER 4749

PRIVATE INVESTIGATORS

4749.01 Definitions

As used in sections 4749.01 to 4749.10, inclusive, of the Revised Code:

(A) "Private investigator" means any person who engages in the business of private investigation, as an individual, a partner, or an officer of a corporation.

(B) "Business of private investigation" means, *** engaging in any of the following for hire:

* * *

(2) Conducting any investigation relevant to any crime or wrong done or threatened, or to obtain information on the identity, habits, conduct, movements, whereabouts, affiliations, transactions, reputation, credibility, or character of any person, or to locate and recover lost or stolen property, or to determine the cause of or responsibility for any libel or slander, or any fire, accident, or damage to property, or to secure evidence for use in any legislative, administrative, or judicial investigation or proceeding.

* * * * *

HISTORY: 1969 H 341, eff. 1-1-70

PROSSER, THE LAW OF TORTS, FOURTH EDITION, WEST PUBLISHING CO. (1971), CHAPTER 3, 13, p. 63

TRESPASS TO LAND

The law pertaining to trespass upon land has been described as "both exceptionally simple and exceptionally rigorous." In the eyes of the common law, every unauthorized entry upon the soil of another was a trespass, "for the law bounds every man's property and is his fence."

(fn. omitted)

PROSSER, THE LAW OF TORTS, FOURTH EDITION, WEST PUBLISHING CO. (1971), CHAPTER 3, 14, p. 76

TRESPASS TO CHATTELS

The earliest cases in which the action of trespass was applied to chattels involved asportation, or carrying off, and a special form of the writ, known as trespass de bonis asportatis, was devised to deal with such situations. *** Later decisions extended the tort to include any direct and immediate intentional interference with a chattel in the possession of another. Thus it is a trespass to damage goods or destroy them, to make an unpermitted use of them, or to move them from one place to another. Under the common law forms, the interference must be direct and forcible, otherwise the action must be on the case; but as in the case of trespass to land, the tendency has long been to ignore any such artificial distinction.

The later development of the common law action of trover, and the tort of conversion[48] provided a substitute for trespass which usually was the more convenient action.

(fn. omitted)

PROSSER, THE LAW OF TORTS, FOURTH EDITION, WEST PUBLISHING CO. (1971), CHAPTER 3, 15, pp. 79, 80, 83 and 87

CONVERSION

Conversion is a fascinating tort, although it has largely eluded the attention of legal writers. Highly technical in its rules and complications, *** it almost defies definition. The chief reason is that the hand of history, with its old common law forms of action, lies heavy upon this particular field.

Although the term had made some earlier appearances, conversion had its real genesis in the old common law action of trover.

* * *

What May Be Converted

What property may be the subject of an action for conversion was at first determined on the basis of the fiction of losing and finding. Any tangible chattel could be found, and so could be converted.

* * *

Once there was severance, however, such goods became personal property, and trover could be maintained for their removal from the land.

* * *

Character of Defendant's Act

A conversion can result only from conduct intended to affect the chattel.

* * *

The intent required is not necessarily a matter of conscious wrongdoing. It is rather an intent to exercise a dominion or control over the goods which is in fact inconsistent with the plaintiff's rights.

* * *

Transferring Possession

Perhaps the most common way in which conversion is committed is by an unauthorized transfer or disposal of possession of the goods to one who is not entitled to them. Normally this is a sufficiently serious interference with the true owner's right of control, although cases are possible in which the consequences of an innocent mistake are so unimportant that conversion will not be found.

PROSSER, THE LAW OF TORTS, FOURTH EDITION, WEST PUBLISHING CO. (1971), CHAPTER 22, 121, pp. 121-122

ABUSE OF PROCESS

* * *

Abuse of process differs from malicious prosecution in that the gist of the tort is not commencing an action or causing process to issue without justification, but misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish. The purpose for which the process is used, once it is issued, is the only thing of importance. Consequently in an action for abuse of process it is unnecessary for the plaintiff to prove that the proceeding has terminated in his favor, or that the process was obtained without probable cause or in the course of a proceeding begun without probable cause.

* * *

The essential elements of abuse of process, as the tort has developed, have been stated to be: first, an ulterior purpose, and second, a wilful act in the use of the process not proper in the regular conduct of the proceeding.

(fn. omitted)

15 U.S.C. §1

§1. Trusts, etc., in restraint of trade illegal.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

* * * * *

(July 2, 1890, ch 647, §1, 26 Stat. 209; Aug. 17, 1937, ch 690, Title VIII, §1, 50 Stat. 693; July 7, 1955, ch 281, 69 Stat. 282; Dec. 21, 1974, P. L. 93-528, §3, 88 Stat. 1708; Dec. 12, 1975, P. L. 94-145, §2, 89 Stat. 801.)

15 U.S.C. §2

§2. Monopolizing trade.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty.

* * *

(July 2, 1890, ch 647, §2, 26 Stat. 209; July 7, 1955, ch 281, 69 Stat. 282; Dec. 21, 1974, P. L. 93-528, §3, 88 Stat. 1708.)

FEDERAL RULES OF CIVIL PROCEDURE 9(b)

Rule 9. Pleading Special Matters

* * * * *

(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

OHIO REVISED CODE §2939.18

2939.18 Fact of indictment shall be kept secret

No grand juror, officer of the court, or other person shall disclose that an indictment has been found against a person not in custody or under bail, before such indictment is filed and the case docketed, except by the issue of process.

HISTORY: 1953 H 1, eff. 10-1-53
GC 13436-15

OHIO REVISED CODE §2939.10

2939.10 Who shall have access to grand jury

The prosecuting attorney or assistant prosecuting attorney may at all times appear before the grand jury to give information relative to a matter cognizable by it, or advice upon a legal matter when required. Such prosecuting attorney may interrogate witnesses before such jury when the jury or the prosecuting attorney find it necessary, but no person other than the grand jurors

shall be permitted to remain in the room with the jurors while the jurors are expressing their views or giving their votes on a matter before them.

* * * * *

HISTORY: 1953 H 1, eff. 10-1-53
GC 13436-7

OHIO REVISED CODE §2939.20

2939.20 Indictment by twelve jurors

At least twelve of the grand jurors must concur in the finding of an indictment. When so found, the foreman shall indorse on such indictment the words "A true bill" and subscribe his name as foreman.

HISTORY: 1953 H 1, eff. 10-1-53
GC 13436-17

ABA, SECTION OF LITIGATION, UNPUBLISHED PAPER, 531-0023/4T, © 1988

ANTITRUST REMEDIES FOR A FORMER EMPLOYEE SUED FOR TRADE SECRET MISAPPROPRIATION

By Edward F. Mannino
Baskin Flaherty Elliott & Mannino, P.C.
Philadelphia, Pennsylvania*

1. The initiation of litigation to protect trade secrets or to enforce a restrictive covenant may give rise to an antitrust counterclaim under Section 2 in favor of the defendant in the trade secret suit. While early Supreme Court decisions required "a pattern of baseless, repetitive claims" to permit an antitrust suit to be grounded upon the filing of litigation, *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 380 (1973), the more recent decision in *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 635 n.6 (1977), has left open the possibility that the filing of one sham suit may be a sufficient basis on which to file an antitrust counterclaim under Section 2.

2. Following the Supreme Court's decision in *Vendo Co., supra*, the lower courts have divided on whether one suit or a series of suits is required to form the basis for a Section 2 counterclaim.

   (a) Cases holding that more than one suit is required include *Razorback Ready Mix Concrete Co. v. Weaver*, 761 F.2d 484 (8th Cir. 1985),

* This paper was originally prepared in June of 1986 and has been updated through May of 1988. Patricia A. Wentworth's assistance is gratefully acknowledged.

cited with approval in *Hufsmith v. Weaver*, 817 F.2d 455 (8th Cir. 1987); *City of Cleveland Elec. Illuminating Co.*, 734 F.2d 1157 (6th Cir. 1984); *Aquarian Products, Inc. v. Dyna Clean, Inc.*, 42 BNA Antitrust & Trade Reg. Rep. 1038 (9th Cir. 1982) (unpublished opinion); *Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F.2d 665, 670 (9th Cir. 1980); *Taylor Drug Stores, Inc. v. Associated Dry Goods Corp.*, 560 F.2d 211 (6th Cir. 1977); *WCCB-TV, Inc. v. TeleRep., Inc.*, 601 F. Supp. 284 (W.D.N.C. 1985); *U.S. Audio & Copy Corp. v. Phillips Business Systems, Inc.*, 1983-1 Trade Cases ¶65,364 (N.D. Cal. 1983); *S.M. Arnold, Inc. v. Union Carbide Corp.*, 487 F. Supp. 1182, 1184 (E.D. Mo. 1980); *Reaemco, Inc. v. Allegheny Airlines*, 496 F. Supp. 546 (S.D.N.Y. 1980); *Mountain Grove Cemetery Ass'n v. Norwalk Vault Co.*, 428 F. Supp. 951 (D. Conn. 1977); *Central Bank of Clayton v. Clayton Bank*, 424 F. Supp. 163 (E.D. Mo. 1976), *aff'd*, 553 F.2d 102 (8th Cir. 1977), *cert. denied*, 433 U.S. 910 (1977). *See also Ernest W. Hahn, Inc. v. Codding*, 615 F.2d 830, 840 (9th Cir. 1980); *Bethlehem Plaza v. Campbell*, 403 F. Supp. 966, 970-71 (E.D. Pa. 1975).

(b) Cases holding that the filing of one suit is sufficient include *MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir. 1983), *cert. denied*, 464 U.S. 891 (1983); *Aydin Corp. v. Loral Corp.*, 718 F.2d 897 (9th Cir. 1983); *Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358 (5th Cir. 1983); *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 42 BNA Antitrust & Trade Reg. Rep. 990 (9th Cir. 1982); *Victory Beauty Supply Co. v. Lus-Ter-Oil Beauty Products*, 562 F. Supp. 786

(N.D. Ill. 1983); *National Cash Register Corp. v. Arnett*, 554 F. Supp. 1176 (D. Colo. 1983); *First American Title Co. v. S.D. Land Title Ass'n*, 541 F. Supp. 1147 (D.S.D. 1982); *Picante, Inc. v. Jiminez Food Products, Inc.*, 1982-2 Trade Cases ¶64,977 (W.D. Tex. 1982); *Sage Int'l Ltd. v. Cadillac Gage Co.*, 507 F. Supp. 939 (E.D. Mich. 1981); *Technician Medical Information Systems Corp. v. Green Bay Packaging, Inc.*, 480 F. Supp. 124 (E.D. Wisc. 1979); *Colorado Petroleum Marketers Ass'n v. Southland Corp.*, 476 F. Supp. 373 (D. Colo. 1979); *Cyborg Systems, Inc. v. Management Science America, Inc.*, 1978-1 Trade Cases ¶61,927 (N.D. Ill. 1978). *See also Associated Radio Service Co. v. Page Airways Inc.*, 414 F. Supp. 1088, 1096 (N.D. Tex. 1976), *aff'd*, 624 F.2d 1342 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981); *Aircapital Cablevision v. Starlink Communications*, 634 F. Supp. 316 (D. Kan. 1986) (single lawsuit may come within sham exception to Noerr-Pennington doctrine only if it involves serious abuse, misuse, or corruption of the judicial process).[1]

[1] The Noerr-Pennington doctrine provides an exception to Sherman Act liability for activities comprising mere solicitation of governmental action with respect to the passage and enforcement of laws, regardless of the soliciting party's anticompetitive purpose. The rationale behind the rule is to protect both the right of private parties to petition the government and the government's interest in a free flow of information and views. *See C.H. Smith Trucking v. Bill Hodges Trucking*, 671 F. Supp. 1329, 1333 (W.D. Okla. 1987). Immunity from antitrust liability under the Noerr-Pennington doctrine does not extend to parties whose activities are merely a sham to cover an attempt to interfere directly with the business relationships of a competitor or to bar competitors from meaningful access to an agency or tribunal. In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), the Supreme Court extended the sham exception to courts and administrative adjudicative bodies.

(c) Other cases have held that the filing of a single lawsuit may be enough only if combined with other actions, or if part of a larger conspiracy. *Omni Resource Dev. Corp. v. Conoco, Inc.*, 739 F.2d 1412 (9th Cir. 1984) (when one suit and not a pattern is challenged, finding that the suit is a sham requires not only that the suit be baseless, but also that it has other characteristics of grave abuse, such as being coupled with actions or effects external to the suit that are themselves anticompetitive); *Rickards v. Canine Eye Registration Found.*, 1986-1 Trade Cases ¶66,969 (N.D. Cal. 1986), citing to *Omni; WCCB-TV, Inc. v. TeleRep, Inc.*, 601 F. Supp. 284 (W.D.N.C. 1985) (filing of a suit was immune from antitrust action when no other anticompetitive acts were alleged); *U.S. Audio & Copy Corp. v. Phillips Business Systems*, 1983-1 Trade Cases ¶65,364 (N.D. Cal. 1983) (institution of a lawsuit by a distributor against its supplier would not immunize the distributor from antitrust liability if the lawsuit were part of a larger conspiracy). *But see In re Burlington Northern, Inc.*, 822 F.2d 518, 525 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 701 (1988) (documents prepared by railroad in connection with lawsuits against pipeline company were protected from discovery to the extent that the activities were genuinely intended to influence governmental action, even if they were part of a larger scheme of anticompetitive conduct).

3. To determine the existence of sham litigation, courts have relied on various theories and buzzwords. These include intent to interfere improperly with the business relations of a competitor, *Aydin Corp. v. Loral Corp.*, 718 F.2d 897 (9th Cir. 1983); *MCI*

Communications v. American Tel. & Tel. Co., 708 F.2d 1081 (7th Cir. 1983), *cert. denied*, 105 S. Ct. 253 (1983); abuse of the judicial process, *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 691 F.2d 678 (4th Cir. 1982), *cert. denied*, 105 S. Ct. 253 (1983), including the filing of a lawsuit without probable cause, *Black Hills Jewelry Mfg. Co. v. Felco*, 1983-2 Trade Cases ¶65,561 (7th Cir. 1983); whether the defendant had filed its suit in good faith, *Columbia Pictures Indus. v. Redd Horne, Inc.*, 749 F.2d 154 (3d Cir. 1984); *Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358 (5th Cir. 1983); and denial of a competitor's access to a judicial tribunal, *First American Title Co. v. S.D. Land Title Ass'n*, 541 F. Supp. 1147 (D.S.D. 1982). The test for sham litigation requires examination of the litigant's intent. The controlling issue is whether the litigant wished to accomplish its anticompetitive end through obtaining court-ordered relief or simply through filing and maintenance of lawsuits. *See In re Burlington Northern, Inc.*, 822 F.2d 518, 527-29 (5th Cir. 1987), *cert. denied*, 108 S.Ct. 701 (1988) (antitrust plaintiff must sustain burden of showing that the defendant was not "significantly motivated by a 'genuine desire for judicial relief' "; this desire for relief must be both honest and reasonable). *But see Sessions Tank Liners, Inc. v. Joor Mfg.*, 827 F.2d 458 (9th Cir. 1987) (petitioning may be sham when, although defendant genuinely seeks to achieve his governmental result, he does so through improper means).[2]

[2] Sham litigation is not limited to actions initiating lawsuits. Defensive litigation can also be sham. *In re Burlington Northern, Inc., supra*, 822 F.2d at 532 (court perceives no reason to apply any different standard to defending lawsuits than to initiating them; to the extent that the defendant's litigation activities are not significantly motivated by an honest and reasonable desire to influence the court's decision and affect the outcome of the case, they are not entitled to protection from antitrust scrutiny).

4. Because of the first amendment considerations implicated in the filing of litigation and resort to the courts or administrative agencies, some courts have held that special pleading requirements should be imposed for antitrust claims founded upon the filing of litigation. *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd.*, 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977); *Caplan v. American Baby*, 582 F. Supp. 869 (S.D.N.Y. 1984); *Miller & Son Paving, Inc. v. Wrightstown Twp. Civ. Ass'n*, 443 F. Supp. 1268, 1273 (E.D. Pa. 1978), *aff'd*, 595 F.2d 1213 (3d Cir.), *cert. denied*, 444 U.S. 843 (1979); *Mountain Grove Cemetery Ass'n v. Norwalk Vault Co.*, 428 F. Supp. 951, 956 (D. Conn. 1977); *Bethlehem Plaza v. Campbell*, 403 F. Supp. 966, 971 (E.D. Pa. 1975). *See also Association of Data Processing Services Org. v. Citibank, N.A.*, 508 F. Supp. 91 (S.D.N.Y. 1980). In the context of the filing of one lawsuit as grounds for an antitrust claim, this special pleading requirement calls for pleading of facts indicating that the filing of the single lawsuit involved some abuse or corruption of the judicial or administrative process. *St. Joseph's Hosp. v. Hospital Auth. of America*, 620 F. Supp. 814 (S.D. Ga. 1985); *Mountain Grove, supra*, 428 F. Supp. at 955.

5. Other courts have expressly refused to impose such a special pleading requirement. *See, e.g., Sage Int'l, Ltd. v. Cadillac Gage Co.*, 507 F. Supp. 939, 942-44 (E.D. Mich. 1981), and cases cited therein.

6. Where one suit is relied upon as the basis for an antitrust counterclaim, it has been held in the context of a trade secrets misappropriation claim that the defendant in such an action must allege

that the filing or prosecution of the trade secrets suit involved some "misuse or corruption of the judicial process," and that an allegation that such a suit was "brought without probable cause and for an anticompetitive purpose" was insufficient to state a claim for relief under Section 2. *Hydro-Tech Corp. v. Sundstrand Corp.*, 673 F.2d 1171 (10th Cir. 1982). *See also Mountain Grove, supra*, 428 F. Supp. at 955; *Aircapital Cablevision v. Starlink Communications*, 634 F. Supp. 316 (D. Kan. 1986).

7. A corporation engaged in the development, marketing, and distribution of computer hardware and software sued its competitor, a former employee, for misappropriation of trade secrets. When "victory for NCR [the established firm] would put the defendant [the fledgling firm] out of business" and "defendant claims that technical proof will show that NCR must have realized that the programs or systems allegedly misappropriated were significantly different," then the conclusion may be drawn that plaintiff's case was a sham. *National Cash Register Corp. v. Arnett*, 554 F. Supp. 1176, 1178 (D. Colo. 1983).

8. Even if the lawsuit which forms the basis for the Section 2 claim is terminated in favor of the Section 2 defendant, antitrust liability for filing and prosecuting such a suit may not be automatically precluded, and success in that litigation is only one factor to be considered in ruling on the Section 2 claim. *Ross v. Bremer*, 1982-2 Trade Cases ¶64,746 (W.D. Wash. 1982); *Sunergy Communities, Inc. v. Aristek Properties, Ltd.*, 535 F. Supp. 1327 (D. Colo. 1982). While some successful petitioning may be sham, a general presumption exists that "successful

judicial action is not a 'sham.' " *In re Burlington Northern, Inc., supra,* 822 F.2d at 527 n.6 (5th Cir. 1987). *See generally P. Areeda & H. Hovenkamp,* Antitrust Law 11, 13 (Supp. 1986). Success or failure is indicative as an evidentiary matter, but it is not determinative of the party's intent. *St. Joseph's Hosp., supra,* 620 F. Supp. 814 (S.D. Ga. 1985). Success or failure is also helpful in determining the good faith of the party instituting the lawsuit. *Columbia Pictures Indus. v. Redd Horne, Inc.,* 749 F.2d 154 (3d Cir. 1984). Indeed, in *Baxter Travenol Laboratories v. LeMay,* 536 F. Supp. 247 (S.D. Ohio 1982), a case involving a former employee's alleged theft of trade secrets, the court allowed bifurcation, with the original plaintiff's complaint being tried first in advance of the antitrust counterclaim in order to aid in determining whether the complaint was baseless, and therefore a sham. *See also Aircapital Cablevision v. Starlink Communications,* 634 F. Supp. 316 (D. Kan. 1986) (antitrust counterclaim alleging that copyright infringement suit was a sham, was bifurcated and copyright suit was later found to be protected by Noerr-Pennington doctrine). Other factors to be considered include "whether defendants intended to harm their competitors by misusing the adjudicatory process by *bringing* the lawsuit without regard or concern about the *result* of the lawsuit; and whether the lawsuit itself would have been baseless or meritless but for the use of deception on the courts." *Ross, supra,* 1982-2 Trade Cases at 71,618. *See also Neuman v. Reinforced Earth Co.,* 594 F. Supp. 139 (D.D.C. 1984), *cert. denied,* 107 S. Ct. 181 (1986); *Chest Hill Co. v. Guttman,* 1981-2 Trade Cases

¶64,417, at 75,054-059 (S.D. Ohio 1981); and Note, *"Limiting the Antitrust Immunity for Concerted Attempts to Influence Courts and Adjudicatory Agencies: Analogies to Malicious Prosecution and Abuse of Process,"* 86 *Harv. L. Rev.* 715 (1973).[3] An exception to this rule is found when the issue of the Section 2 defendant's good faith in instituting the challenged lawsuit is itself litigated in the original proceeding. When the Section 2 defendant succeeds on this point, its good faith is res judicata in the subsequent Section 2 lawsuit. *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 1982-1 Trade Cases ¶64,451 (N.D. Ill. 1981); Note, *"The Collateral Estoppel Effect of Prior State Court Findings in Cases Within Exclusive Federal Jurisdiction,"* 91 *Harv. L. Rev.* 1281, 1287 (1978).

9. Success or failure is also not solely indicative of an attorney's liability for pursuing plausible claims. When an attorney files a complaint which offers a new theory cutting against much precedent, and it is determined that he instituted the claim solely because of the cost the suit would impose on his client's competitors, even if his client prevails in the action, he may be liable for fees in bad faith because the case has caused his client's adversaries to bear excessive costs. *In re TCI Ltd.*, 769 F.2d 441 (7th Cir. 1985).

10. If the challenged lawsuit is found to have been sham, the Section 2 plaintiff may recover the costs of defending the suit. *See Rickards v. Canine Eye*

[3] *See also Von Bulow v. Von Bulow*, 657 F. Supp. 1134, 1145 (S.D.N.Y. 1987) in which the court rejected plaintiff's analogy between an action for malicious prosecution as a predicate act under RICO and the antitrust doctrine of liability for repetitive, sham litigation.

Registration Found., 1986-1 Trade Cases ¶66,969 (N.D. Cal. 1986); *Syufy Enterprises v. American MultiCinema, Inc.*, 602 F. Supp. 1466 (N.D. Cal. 1983), *cert. denied*, 107 S. Ct. 876 (1987), *aff'd in part rev'd in part*, 783 F.2d 878 (9th Cir. 1986); *Rahal v. Crestmont Cadillac Corp.*, 514 F. Supp. 926 (N.D. Ohio 1981).

11. A federal court may not, however, enjoin the prosecution of a single pending state court trade secrets case or other suit on the basis that it constitutes sham litigation violative of the *Sherman Act. Vendo Co. v. Lektro Vend Corp.*, 433 U.S. 623 (1977); *Robert Heller Ass'n v. Sperry Univac Div.*, 452 F. Supp. 142, 144 (S.D.N.Y. 1978); Note, *supra*, 91 *Harv. L. Rev.* at 1300 n.100.

12. Because of the skeptical attitude often taken by the federal courts to claims that lawsuits instituted against a Section 2 plaintiff were sham, careful attention must be devoted in drafting the antitrust complaint to alleging with some specificity the elements of a Section 2 violation, including the defendant's market share and power, unlawful means in attaining such power, the definition of the relevant product and geographic markets, the precise nature and effect on competition of any exclusionary acts, and the nature of any abuse or corruption of the judicial or adjudicatory process resulting from allegedly sham litigation. *See Mackey v. Sears Roebuck & Co.*, 237 F.2d 869, 873 (7th Cir. 1956); *appeal dismissed*, 355 U.S. 865 (1957); *Sumney v. Ford Motor Credit Co.*, 449 F. Supp. 132, 141 (D.S.C. 1976), *aff'd*, 573 F.2d 1306 (4th Cir. 1978); *National Research Bureau, Inc. v. Bartholomew*, 331 F. Supp. 1003, 1005 (W.D. Pa.

1971), *modified on other grounds*, 482 F.2d 386 (3d Cir. 1973); *B&B Oil & Chem. Co. v. Franklin Oil Corp.*, 293 F. Supp. 1313, 1319 (E.D. Mich. 1968); *McElhenney Co. v. Western Auto Supply*, 167 F. Supp. 949, 956 (W.D.S.C. 1958), *aff'd*, 269 F.2d 332 (4th Cir. 1959). When an antitrust plaintiff fails to produce evidence of market data or to identify the market power of the defendants individually or collectively, its proof of monopoly power is "fatally defective." *See C.H. Smith Trucking v. Bill Hodges Trucking*, 671 F. Supp. 1329, 1336 (W.D. Okla. 1987) ("[t]he elements of monopolization under Section 2 are 'the possession of monopoly power in the relevant market' and 'the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident'.")

13. The First Circuit has recently held that the exaction of licensing agreements through the bad faith assertion of trade secrets by a party in a far superior bargaining position with the intent of restraining competition and monopolizing the market is a violation of the antitrust laws. Though not directly involving sham litigation, the standards relied on by the court are analogous. In resolving the tension between the antitrust and trade secret laws, the court held that a proper balance is achieved by requiring the antitrust plaintiff to prove that the defendant asserted trade secrets with the knowledge that no trade secrets existed. *CVD, Inc. v. Raytheon, Co.*, 769 F.2d 842 (1st Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986).

AFFIDAVIT OF LESTER W. SMITH

(Filed January 28, 1986)

Case No. C85-3451A

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LESTER W. SMITH, *et al.*,
Plaintiffs,

vs.

COMBUSTION ENGINEERING, INC., *et al.*,
Defendants.

AFFIDAVIT OF PLAINTIFF LESTER W. SMITH IN OPPOSITION TO AN FRCP 56 MOTION FILED DECEMBER 30, 1985 BY COMBUSTION ENGINEERING

AFFIDAVIT

I am LESTER W. SMITH, a plaintiff in this action. After first being duly sworn, I state under oath and of my own personal knowledge that the following facts are true.

1. I read each and every allegation in the Complaint in this action prior to filing thereof on November 18, 1985, and believed them to be true to the best of my knowledge.

2. My signature appears on page 22 of the Complaint under this statement.

VERIFICATION

Lester W. Smith, says that he has read the allegations contained in the Complaint, and that they are true as he verily believes and to the best of my knowledge.

3. That I have just finished another reading of the allegations in the Complaint, and again affirm or reaffirm that the allegations thereof are true.

4. I do wish to make two additional statements.

A. At no time since I left the employment of Combustion Engineering in 1976 can I recall having received any money or other compensation from Combustion Engineering or C-E Cast Equipment for my services as an executive or as an engineer; except that I was paid for three months service as a consultant to C-E Cast Equipment.

B. At no time after the search of my residence on December 8, 1981 have I ever received money or other compensation from Combustion Engineering or C-E Cast Equipment, or from any person or company whom I knew to be associated with them, for anything: not before January 13, 1984; not on January 13, 1984; not after January 13, 1984.

At this time, I have nothing further to say.

/s/ LESTER W. SMITH
310 Simon Road
Hudson, Ohio 44236

January 28, 1986

Sworn to and subscribed before me, a Notary Public in and for the State of Ohio.

/s/ (Illegible)
Notary Public
My Commission Expires
June 16, 1986

January 28th, 1986

AFFIDAVIT OF LESTER W. SMITH

(Filed December 10, 1986)

Case No. C85-3451A

PLAINTIFF'S EXHIBIT 200

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LESTER W. SMITH, *et al.*,
Plaintiffs,

vs.

COMBUSTION ENGINEERING INC., *et al.*,
Defendants.

FURTHER AFFIDAVIT OF LESTER W. SMITH

State of Ohio
County of Summit } ss.:

LESTER W. SMITH, being first duly sworn, deposes and says:

1. Affiant is of lawful age and resides at 310 Simon Road, Hudson, Ohio 44236.

2. Affiant is a plaintiff in Case No. C85-3451A filed in United States District Court for the Northern District of Ohio, Eastern Division.

3. Affiant has personal knowledge of the facts sworn to herein excepting only those expressly sworn to upon information and belief.

4. That Affiant has read for himself and understands the words of an attorney for defendants as set forth in a document with the title REPLY BRIEF OF THE COMBUSTION ENGINEERING DEFENDANTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT.

5. That Affiant challenges the truth and accuracy of statements of fact made by an attorney for defendants in the REPLY BRIEF, including the statements appearing on the various pages as indicated in the following paragraphs.

6. Attached hereto as Exhibit 201 is a document comprising nine (9) pages excerpted from a C-E Cast document entitled—

Ad Hoc Committee Report, October 7, 1975

A copy of Exhibit 201 was first made of record as Defendant Smith's Motion Exhibit A on October 7, 1982 in a matter being heard before the Court of Common Pleas (Criminal Branch) as *State of Ohio vs. Lester W. Smith, et al.* A witness, Edwin Kavanagh, was cross-examined using [Exhibit 201]. As recorded in the transcript of the hearing (Tr. 91, 92)—

> "Q. Showing you what has been marked for identification as one page of a book that is entitled, "The Ad Hoc Committee Report on C-E Cast Equipment", you are familiar with this report, aren't you, Mr. Kavanagh?
>
> A. I have not seen this specific report. I know there was a report made, and I know there were discussions of it, but at the particular time I was not involved in that evaluation.
>
> Q. I invite your attention here to Page III-28, Subsection, parts. Would you read to Judge Corrigan what it says there, please?

MR. GASPER: Object.
THE COURT: Overruled.
THE WITNESS: "The market for parts for various C-E Cast Equipment products is estimated to be approximately $14,000,000. At the present time C-E Cast Equipment's own share of this business is only in the 20 percent-30 percent range.

In 1973 the volume of parts orders increased substantially, causing very severe delivery problems for Cast Equipment. Lack of availability of parts had an adverse effect on volume in 1974 and, to date, in 1975.

Corrective measures adopted in 1974 and 1975 to improve the share of the market which Cast Equipment gets includes the following:"

7. The above excerpt from the Kavanagh testimony contradicts the argument by the attorney, page 2—"The focus in this law suit must remain on 'make' type spare parts for C-E Cast molding machines." I believe and assert it to be clear beyond doubt that the market for replacement or spare parts included many parts other than "make" parts.

8. On page 3 of the Reply Brief, the attorney says as a truth that ". . . C-E Cast's detailed drawings and specifications, . . . were confidential, protected and not available to anyone outside of C-E Cast." I believe and assert that this statement was incorrect in 1975 and also in 1980-81, and, I further believe and assert that a statement appearing on the last line of page 1 of Exhibit 201 represents the truth—*One must conclude that the drawings and technical information required to produce the parts are readily available.*

9. I further believe and assert that customers of C-E Cast did have access to detailed plans for their foundry equipment as indicated by the statements

appearing in Exhibit 201 at the bottom of page 8 and the top of page 9—

> *(c) Plans For The Machine*
>
> Many purchasers indicated a desire to *receive promptly* the *detailed plans to their Spo installation.* This is not a major concern, but one which was frequently brought up. It is *related to the spare parts problem* because those foundries with in-house machining capabilities resort to making their own parts when they cannot get them from C-E Cast.

10. Having been involved in the matters alleged in the Complaint as an indicted criminal defendant subsequent to December 8, 1981 and until date of filing the Complaint on November 18, 1985, it is my belief and assertion that defendant Edwin Kavanagh and non-party Edward Niam of Niam Investigations did provide and give to Frank C. Gasper, the assistant Cuyahoga County Prosecutor, factual information known to be false, fraudulent and misleading.

FURTHER, Affiant sayeth naught.

/s/ LESTER W. SMITH

SWORN TO AND SUBSCRIBED before me, a Notary Public in and for the county aforesaid, this 10th day of December, 1986.

/s/ JULIE A. GARCIA (MOLLOHAN)
Notary Public
State of Ohio
Resident Summit County
My Commission Expires
(Illegible), 1987

LETTER, EDWARD NIAM TO JAMES B. KELLY, JANUARY 27, 1984

EXHIBIT 2

EDWARD NIAM
INVESTIGATIONS, INC.

(216) 535-5764
Suite 320
277 S. Broadway
Akron, Ohio 44308

EDWARD NIAM, JR.
President

January 27, 1984

Combustion Engineering Inc.
Mr. James B. Kelly
Group Vice President
Industrial Products
900 Long Ridge Road
Stamford, Conn 06902

Dear Mr. Kelly:

Although we never met, your name has come up often in the past couple of years. Anytime an important decision had to be made, we always heard someone from C-E Cast mention something about "Kelly from Corporate."

My purpose in writing is simply to say that it was a pleasure working for Combustion Engineering and C-E Cast. I hope that in some small way we were able to help obtain the necessary evidence and bring the case to a desirable conclusion.

Although the penalties may not seem harsh enough to fit the crimes, there are other forms of built in punishments, as I am sure you are already aware. The loss of employment and income, expensive attorney's fees, public disgrace and humiliation, being humbled into

pleading guilty in a criminal offense and the psychological trauma of over two years of uncertainties can often weigh more heavily than a prison term.

During any investigation the cooperation of the client is essential in achieving successful results. The dynamic leadership of William Roche was a key element in continuing a sustained drive during the more intense periods of the case. George Fisher also played an important role, and was involved in almost every phase of the investigation.

There is no doubt in my mind that we would not have been victorious without the energy, enthusiasm and determination of Edwin Kavanagh. His knowledge of the industry, his ability to work under the most exasperating conditions and his capacity for detail made him the most valuable member of our team. If I had to describe him in one word, it would be "great."

And of course there were others at C-E Cast, too numerous to mention, who also made invaluable contributions.

My congratulations to you and your company for having the courage to step forward and bring the weight of prosecution to bear against a group of criminals. It was a step forward for American industry and all of us who have an interest in combating White Collar Crime.

If we can ever again be of service, do not hesitate to contact me at any time.

Sincerely,

EDWARD NIAM, JR.
EDWARD NIAM, JR.
President

elk

LETTER, EDWARD NIAM TO WILLIAM F. ROCHE, FEBRUARY 3, 1984

EXHIBIT 3

EDWARD NIAM
INVESTIGATIONS, INC.

(216) 535-5764
Suite 320
277 S. Broadway
Akron, Ohio 44308

EDWARD NIAM, JR.
President

February 3, 1984

Mr. William F. Roche
President
C-E Basic
845 Hanna Building
Cleveland, Ohio 44115

Dear Mr. Roche;

You are already aware I'm sure that the case against "Lester and the boys" has been concluded. Although they aren't going to prison, they have suffered enormously, and the effects will be with them for a long time to come.

Many thanks to you and your staff for the first class treatment we received throughout the entire case. It was an interesting investigation and was an educational experience for us all. Needless to say I couldn't say enough about Ed Kavanagh. We could not have gone as far as we did without him. He is one of the best "investigators" we have ever worked with.

For me personally, this case was quite a growing experience. I especially benefitted from observing your actions and reactions during crucial periods of the

investigation. Whenever I am in need of sound opinions regarding management, I hope I can call on you for advice and counsel.

Again thank you, and if we can ever be of service, do not hesitate to call me at any time.

Sincerely,

EDWARD NIAM, JR.
EDWARD NIAM, JR.
President

elk

LETTER, EDWARD NIAM TO PETER PHIPPS, JANUARY 30, 1984

EXHIBIT 4

EDWARD NIAM
INVESTIGATIONS, INC.

(216) 535-5764
Suite 320
277 S. Broadway
Akron, Ohio 44308

EDWARD NIAM, JR.
President

January 30, 1984

Mr. Peter Phipps
Akron Beacon Journal
44 East Exchange Street
Akron, Ohio 44328

Dear Peter;

Just a note of thanks for all the coverage you gave us on the C-E Cast case. As you know it is finally concluded, and C-E Cast and Combustion Engineering were happy with the results.

If we can ever be of service, do not hestitate to contact me at any time.

Sincerely,

EDWARD NIAM, JR.
EDWARD NIAM, JR.
President

elk

LETTER, EDWARD NIAM TO TOM BERES, FEBRUARY 1, 1984

EXHIBIT 5

EDWARD NIAM
INVESTIGATIONS, INC.

(216) 535-5764
Suite 320
277 S. Broadway
Akron, Ohio 44308

EDWARD NIAM, JR.
President

February 1, 1984

Mr. Tom Beres
National Broadcasting Company, Inc.
1403 East Sixth Street
Cleveland, Ohio 44111

Dear Tom;

Just a note of thanks for the fantastic job you did in getting the C-E Cast case so much news coverage. There is no doubt in my mind that your efforts helped us bring the case to a successful conclusion.

If I can ever be of service, do not hestitate to contact me at any time.

Sincerely,

EDWARD NIAM, JR.
President

elk

LETTER, EDWARD NIAM TO RICHARD LOBO, FEBRUARY 1, 1984

EXHIBIT 6

EDWARD NIAM
INVESTIGATIONS, INC.

(216) 535-5764
Suite 320
277 S. Broadway
Akron, Ohio 44308

EDWARD NIAM, JR.
President

February 1, 1984

Mr. Richard Lobo
Vice President-General Manager
National Broadcasting Company, Inc.
1403 East Sixth Street
Cleveland, Ohio 44111

Dear Mr. Lobo;

Many thanks are in order for the excellent news coverage your station gave to the C-E Cast industrial espionage case recently concluded in Cuyahoga County Common Pleas Court.

Special commendation should be given to Tom Beres who was responsible for our case receiving such extensive coverage. The professionalism and integrity he displayed and his grasp of the facts helped relate to the viewing public the inner workings of a classic case of industrial espionage. Roger Wolfe and the Akron Bureau also did an exemplary job covering the case from this end.

Again, thank you for your assistance, and if I can ever be of service do not hesitate to call me at any time.

Sincerely,

EDWARD NIAM, JR.
EDWARD NIAM, JR.
President

elk

LETTER, EDWARD NIAM TO ASSISTANT PROSECUTOR GASPER, JANUARY 30, 1984

EXHIBIT 7

EDWARD NIAM
INVESTIGATIONS, INC.

(216) 535-5764
Suite 320
277 S. Broadway
Akron, Ohio 44308

EDWARD NIAM, JR.
President

January 30, 1984

Assistant Prosecutor Frank Gasper
Cuyahoga County Prosecutor's Office
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44111

Dear Frank;

Just a note of thanks for all the time and energy you devoted to the C-E Cast case. Needless to say that without your efforts we would not have had a satisfactory conclusion to a very complex and often exasperating case.

We all learned a great deal working with you and hope to do it again sometime.

If we can ever be of service, do not hesitate to contact me at any time.

Sincerely,

EDWARD NIAM, JR.
EDWARD NIAM, JR.
President

elk

LETTER, EDWIN M. KAVANAGH TO EDWARD NIAM, JANUARY 16, 1984

EXHIBIT 8

C-E CAST EQUIPMENT
Combustion Engineering, Inc.
7887 Hub Parkway
Cleveland, Ohio 44125 U.S.A.

Tel. 216/524-9000
Telex 98-0548

C-E CAST EQUIPMENT

January 16, 1984

Mr. Edward Niam, Director
Edward Niam Investigations
277 South Broadway—Suite 320
Akron, Ohio 44308

Dear Ed:

Enclosed are copies of the "Settlement Agreement and Mutual Release" agreements signed by Lester W. Smith and Donald R. Blalock last Friday.

As we discussed, you should have a copy for your files in case any future litigation might arise.

Sincerely,

/s/ EDWIN M. KAVANAGH
EDWIN M. KAVANAGH
Vice President
Replacement Parts

2—Enc.

LETTER, EDWARD NIAM TO EDWIN KAVANAGH, FEBRUARY 1, 1984

PLAINTIFF'S EXHIBIT 20-5

EDWARD NIAM
INVESTIGATIONS, INC.

(216) 535-5764

Suite 320
277 S. Broadway
Akron, Ohio 44308

EDWARD NIAM, JR.
President

February 1, 1984

Mr. Edwin Kavanagh
Vice President
Replacement Parts
C-E Cast Equipment
7887 Hub Parkway
Cleveland, Ohio 44125

RE: Case No. ENI-110 Western Reserve Group, Inc. C/V# 81-0011

Dear Ed;

Enclosed is our *final* report regarding the "Marathon Case" as quoted from Channel 3's news report. You probably thought you would never see "This case is closed" on the last page of one of our reports.

From Donald, myself and our staff, I want to say that it was a pleasure working with you and your company. The case was the most interesting one we have had to date, and I can truthfully say that I don't recall a dull moment.

You are a professional in the truest sense of the word, and I truly believe that a desirable conclusion would not have been accomplished without your tireless efforts and perserverence.

A bond of friendship has developed between us that I hope will always continue. We are always at your service.

Sincerely,

EDWARD NIAM, JR.
President

Enclosures

elk

LETTER, LAWRENCE K. HUBBELL TO DONALD L. SOUTHAM, JANUARY 29, 1986

PLAINTIFF'S EXHIBIT 48-4 p.1

cc John Bren
Bill Roche

34
■ 216/237-2233

ROYALTON
MANUFACTURING INC.

■ 18300 ROYALTON ROAD ■ P.O. BOX 33190
■ CLEVELAND, OHIO 44133-0190

January 29, 1986

Donald L. Southam
C-E Cast Equipment
Combustion Engineering
7887 Hub Parkway
Cleveland, Ohio 44125

Dear Mr. Southam:

Late in the summer of 1981, Royalton Manufacturing, Incorporated was approached by Ed Niam of Niam Investigations and subsequently by Ed Kavavagh of C-E Cast Equipment concerning the problem you were having with Western Reserve Group, Incorporated. They were also concerned with the extent of Royalton's involvement with Western Reserve Group, Incorporated.

As you are aware, Royalton's involvement with Western Reserve was that of a vendor. We quoted jobs, received purchase orders, and shipped completed parts. At no time was our relationship with Western Reserve anything other that that of buyer-seller.

Upon being informed of the questionable activities of Western Reserve, we informed Mr. Kavavagh that we

cease doing business with Western Reserve. At that point, Mr. Kavavagh asked us to continue doing business with Western Reserve and to assist C-E Cast with their investigation, which we did.

PLAINTIFF'S EXHIBIT 48-4 p. 2

As a result of our co-operation with C-E Cast in the investigation, we now find ourselves listed as co-defendants with Combustion Engineering in two (2) lawsuits. Since C-E Cast asked for our assistance in the investigation, and since we are listed as defendants in the lawsuits because of the role we played in the investigation, we feel that, at the minimum, C-E Cast is obligated to provide for our defense. Please consider this letter as our formal request for financial assistance from C-E Cast Equipment for providing our defense in the two (2) lawsuits (IE; Lester Smith & Don Blalock).

Please remit to Royalton Manufacturing, Incorporated, PO Box 33190, Cleveland, Ohio 44133. Legal fees to date are:

Gary A. Ebert	$ 621.60 for services rendered
William A. Hamann	5000.00 Retainer

Additional invoices will be sent to you as they are received.

Respectfully,

/s/ LAWRENCE K. HUBBELL
LAWRENCE K. HUBBELL
President

NOTE

39

Exhibit 12, identified at page 115 of Kavanagh Deposition taken 5-20-86.

[Exhibit 12 (a poor copy) was filed 4-20-87 in an envelope attached to Dkt. Nr. 109, Response. At the hearing, Exhibit 12 will be easel mounted as a 24" x 36" copy of a drawing prepared at C-E Cast Equipment probably by defendant Kavanagh. The poor copy of this exhibit was furnished by Walter A. Bates, Esq., to Mack D. Cook, II, Esq., in response to a discovery request. The cooperation of Mr. Bates will be necessary to provide either the original or a fair copy of Exhibit 12.]

No. 88-1134 (3)

Supreme Court, U.S.
FILED
FEB 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1988

LESTER W. SMITH and WESTERN RESERVE GROUP, INC.,
Petitioners,

vs.

COMBUSTION ENGINEERING, INC., C-E CAST EQUIPMENT, JAMES F. CALVERT, GEORGE E. FISHER, JR., LAWRENCE K. HUBBELL, EDWIN M. KAVANAGH, JAMES B. KELLY, JAMES E. KLIMA, THOMAS E. McGRANAHAN, WILLIAM FRANCIS ROCHE, ARTHUR J. SANTRY, JR., and FG DOE, EN ROE and JB LOE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPPOSING BRIEF OF RESPONDENTS COMBUSTION ENGINEERING, INC., C-E CAST EQUIPMENT, JAMES F. CALVERT, GEORGE E. FISHER, JR., EDWIN M. KAVANAGH, JAMES B. KELLY, JAMES E. KLIMA, THOMAS E. McGRANAHAN, WILLIAM FRANCIS ROCHE, and ARTHUR J. SANTRY, JR.

WALTER A. BATES, *Counsel of Record*
IRENE C. KEYSE-WALKER
GREGORY V. MERSOL
ARTER & HADDEN
1100 Huntington Building
Cleveland, Ohio 44115
(216) 696-1100

Counsel for Respondents Combustion Engineering, Inc., C-E Cast Equipment, James F. Calvert, George E. Fisher, Jr., Edwin M. Kavanagh, James B. Kelly, James E. Klima, Thomas E. McGranahan, William Francis Roche, and Arthur J. Santry, Jr.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

26 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court of Appeals correctly held that petitioners' civil rights claims were barred by the applicable statute of limitations.

II. Whether the Court of Appeals correctly held that the *Noerr-Pennington* doctrine barred petitioners' claims of antitrust violations arising out of respondents' providing information to the Cuyahoga County prosecutor regarding theft of respondents' proprietary engineering drawings, in light of petitioners' consequent prosecution, indictment and guilty pleas to receiving stolen property and conversion of trade secrets.

II.

LIST OF PARTIES AND RULE 28.1 STATEMENT

Respondent Combustion Engineering, Inc. ("Combustion") is a Delaware corporation headquartered in Stamford, Connecticut. Respondent C-E Cast Equipment ("C-E Cast") is a division of Combustion located in a suburb of Cleveland, Ohio [Complt., ¶¶5, 6(a), Pet. App. 108].[1] Eight present or retired officers and employees of the two corporate entities were also named as defendants, along with Lawrence K. Hubbell, President of Royalton Manufacturing Company, which manufactured parts for petitioner Western Reserve Group [Complt., ¶¶7-15, A. 111-2].

Combustion is a publicly held corporation whose stock is traded on the New York Stock Exchange. It has no affiliations that must be reported under Supreme Court Rule 28.1.

---

[1] References to Petitioners' Appendix to Petition for Writ of Certiorari will herein be by page number prefixed "A."

TABLE OF CONTENTS

Questions Presented for Review. I

List of Parties and Rule 28.1 Statement II

Statutes and Regulations Involved 1

Statement of the Case 2

A. C-E Cast is a manufacturer of foundry molding equipment and "make" type replacement parts for that equipment 2

B. C-E Cast learned that customers were being offered "make" type replacement parts manufactured from proprietary drawings 2

C. C-E Cast retained a professional agency . . . 3

D. Results of investigation were provided to the county prosecutor, who obtained a search warrant, criminal indictments, and guilty pleas 3

Reasons Why the Petition Should Be Denied 5

A. The Court of Appeals correctly held that petitioners' civil rights claims were barred by the applicable statute of limitations. . . . 5

B. The Court of Appeals correctly held that the *Noerr-Pennington* Doctrine barred petitioners' claims of antitrust violations arising out of respondents' providing information to the Cuyahoga County Prosecutor regarding the theft of respondents' proprietary engineering drawings, in light of petitioners'

consequent prosecution, indictment and guilty pleas to receiving stolen property and converting trade secrets. 7

C. Petitioners' collateral issues raise no question of import 9

Conclusion 10

Appendix:

Ohio Rev. Code §1333.51 . . . . . R1

Ohio Rev. Code §2305.09 . . . . . R3

Ohio Rev. Code §2305.10 . . . . . R4

Ohio Rev. Code §2305.11(A) R5

Ohio Rev. Code §2913.32 . . . . . R6

Ohio Rev. Code §2913.51 (1982 version) R7

Ohio Rev. Code §2923.24 . . . . . R8

TABLE OF AUTHORITIES

Cases

Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. _____, 108 S.Ct. 1931 (1988) 7

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972) 8

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1967) 7

Hunter v. Shenango Furnace Co., 38 Ohio St. 3d 235, 527 N.E.2d 871 (1988) 6

Owens v. Okure, 488 U.S. _____, 57 U.S.L.W. 4065 (Jan. 10, 1989) 5,6

Patrick v. Burget, 486 U.S. _____, 108 S.Ct. 1658 (1988) 7

Potters Medical Center v. City Hosp. Ass'n, 800 F.2d 568 (6th Cir. 1986) 8

Thomas v. Shipka, 488 U.S. _____, (U.S. Jan. 23, 1989) (No. 87-1384) 5

Wilson v. Garcia, 471 U.S. 261 (1985) 5,6

VI.

Statutes and Regulations

Ohio Rev. Code §1333.51 1,4

Ohio Rev. Code §2305.09 1,6

Ohio Rev. Code §2305.10 1,6

Ohio Rev. Code §2305.11 1,5

Ohio Rev. Code §2913.32 1,4

Ohio Rev. Code §2913.51 1,4

Ohio Rev. Code §2923.24 1,4

15 U.S.C. §1 1,4

15 U.S.C. §2 1,4

42 U.S.C. §1983 1,4,5,9

No. 88-1134

IN THE

Supreme Court of the United States

October Term, 1988

LESTER W. SMITH and WESTERN RESERVE GROUP, INC.,
Petitioners,

vs.

COMBUSTION ENGINEERING, INC., C-E CAST EQUIPMENT, JAMES F. CALVERT, GEORGE E. FISHER, JR., LAWRENCE K. HUBBELL, EDWIN M. KAVANAGH, JAMES B. KELLY, JAMES E. KLIMA, THOMAS E. McGRANAHAN, WILLIAM FRANCIS ROCHE, ARTHUR J. SANTRY, JR., and FG DOE, EN ROE and JB LOE,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OPPOSING BRIEF OF RESPONDENTS COMBUSTION ENGINEERING, INC., C-E CAST EQUIPMENT, JAMES F. CALVERT, GEORGE E. FISHER, JR., EDWIN M. KAVANAGH, JAMES B. KELLY, JAMES E. KLIMA, THOMAS E. McGRANAHAN, WILLIAM FRANCIS ROCHE, and ARTHUR J. SANTRY, JR.

STATUTES AND REGULATIONS INVOLVED

This action involves the following statutes:

1. The Sherman Act, 15 U.S.C. §§1, 2 [A. 136].

2. The Civil Rights Act of 1871, 42 U.S.C. §1983 [A. 136].

3. Conversion of Trade Secrets, Ohio Rev. Code §1333.51 [Respdt. App. 1[2]].

4. Time Limitations, Certain Torts, Ohio Rev. Code §2305.09 [R. 3].

5. Time Limitations, Bodily Injury or Injury to Personal Property, Ohio Rev. Code §2305.10 [R. 4].

6. Time Limitations, Certain Actions, Ohio Rev. Code §2305.11 [R. 5].

7. Criminal Simulation, Ohio Rev. Code §2913.32 [R. 6].

8. Receiving Stolen Property, Ohio Rev. Code §2913.51 [R. 7].

9. Possessing Criminal Tools, Ohio Rev. Code §2923.24 [R. 8].

---

[2] References to Respondents' Appendix will herein be page number prefixed "R."

STATEMENT OF THE CASE

A. C-E Cast is a manufacturer of foundry molding equipment and "make" type replacement parts for that equipment.

C-E Cast manufactures foundry molding equipment which forms parts for incorporation into motor vehicles, farm machinery and similar equipment. It also manufactures "make" type replacement parts, according to confidential drawings. Any person who wanted to manufacture and sell "make" type parts would have to have C-E Cast's proprietary engineering details. Except in rare emergency situations, it was the practice of C-E Cast *not* to provide its engineering drawings to a customer. Pursuant to C-E Cast's published policy, any employee who gave such drawings to a third party would be terminated.

B. C-E Cast learned that customers were being offered "make" type replacement parts manufactured from proprietary drawings.

In mid-July 1981, C-E Cast received an anonymous letter that claimed that C-E Cast "has been bilked out of" spare parts sales by transfer of "C-E Cast's proprietary drawings." At about the same time, C-E Cast became aware that its proprietary "make" type parts were being offered to at least three established customers. C-E Cast learned from these customers that an outside organization was indicating that it could provide "make" type parts for C-E Cast equipment [Complt., ¶19; A. 112].

C. C-E Cast retained a professional agency.

In August of 1981, C-E Cast engaged Niam Investigations [Complt., ¶20; A. 113], a professional organization, to investigate the possible use of its confidential information, drawings and data by present or former employees in an improper or illegal manner. The Niam investigation eventually showed that C-E Cast drawings were being removed from the company by C-E Cast employees, copied and sent to various small manufacturers, including respondent Hubbell. These manufacturers were producing "make" type replacement parts which were being offered for sale to C-E Cast's customers. Specifically, former employee Lester Smith and his company, Western Reserve Group, were using confidential C-E Cast drawings to compete with C-E Cast.

D. Results of investigation were provided to the county prosecutor, who obtained a search warrant, criminal indictments, and guilty pleas.

Upon completion of the investigation, C-E Cast provided its results to the Cuyahoga County Prosecutor [Complt., ¶27, A. 114], who took charge of further proceedings. Thereafter C-E Cast provided assistance to the prosecutor at his request.

In early December, 1981, an affidavit for a search warrant was prepared by the county prosecutor [Complt., ¶28, A. 114] and on December 7, search warrants were issued out of the Cuyahoga County and Summit County Common Pleas Courts [Complt., ¶30, A. 115]. On December 8, 1981, after a search of petitioner Smith's house and other locations, the Sheriff's Department confiscated various documents [Complt., ¶¶32, 40, A. 115, A. 117].

In January of 1982, petitioner Lester W. Smith was named in a four-count indictment [Complt., ¶¶70-71, A. 124] charging him with theft or conversion of trade secrets [Ohio Rev. Code §1333.51, R. 1]; criminal simulation [Ohio Rev. Code §2913.32, R. 6] receiving stolen property [Ohio Rev. Code §2913.51, R. 7] and possession of criminal tools [Ohio Rev. Code §2923.24, R. 8]. Petitioner Western Reserve Group waived indictment and accepted an information charging a violation of conversion of trade secrets under Ohio Rev. Code §1333.51 [R. 1] [Complt., ¶73(2), A. 125].

On January 13, 1984, pursuant to a plea agreement between Lester Smith and the prosecutor, petitioner Lester Smith entered a plea of guilty to the misdemeanor of receiving stolen property of a value less than $150.00, a lesser and included offense in Count III of the indictment. The plea arrangement further provided that Smith, on behalf of petitioner Western Reserve Group, would enter a plea of guilty to a violation of Ohio Rev. Code §1333.51 [R. 1], conversion of trade secrets (a fourth degree felony).

Lester Smith was fined $1,000.00, given a suspended six-month jail sentence and placed on probation for one year. Western Reserve Group was fined $5,000.00.

Lester Smith and Western Reserve Group instituted this litigation on November 18, 1985, charging in Count I a violation of his civil rights under 42 U.S.C. §1983 [A. 136] and charging in Counts II and III antitrust violations under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2 [A. 142].

REASONS WHY THE PETITION SHOULD BE DENIED

The petition should be denied because the claims asserted were correctly dismissed by the District Court and those dismissals were affirmed by the Sixth Circuit Court of Appeals on the authority of decisions of this Court and the Court of Appeals.

A. The Court of Appeals correctly held that Petitioners' civil rights claims were barred by the applicable statute of limitations.

In Count I of his Complaint, petitioner Smith alleged that defendants violated his civil rights "in concert or conspiracy with persons acting under color of state law" when a member of the Sheriff's Department for Summit County, Ohio, presented a search warrant to petitioner at his home on December 8, 1981, and proceeded to conduct a search and seizure of documents relating to petitioners' business [Complt., ¶¶34-45, A. 116-19]. The District Court and Court of Appeals held that the §1983 claims were barred by Ohio's one-year statute of limitations for certain torts (including malicious prosecution), Ohio Rev. Code §2305.11(A) [R. 5].

In *Wilson v. Garcia*, 471 U.S. 261 (1985), this Court held that federal courts should apply the state statute of limitations for personal injury claims to §1983 claims. This Court has just ordered the Sixth Circuit to reconsider its application of Ohio's one-year statute of limitations for intentional torts in light of this Court's recent decision, *Owens v. Okure*, 488 U.S. _____, 57 U.S.L.W. 4065 (Jan. 10, 1989). *Thomas v. Shipka*, 488 U.S. _____, (U.S. Jan. 23, 1989) (No. 87-1384). In *Thomas*, the plaintiff's claim was timely if

Ohio's two-year general personal injury statute were applied. But that statute does not aid petitioners. As noted by the Sixth Circuit herein:

> Even if this court should conclude upon rehearing that *Mulligan v. Hazard* [777 F.2d 340 (6th Cir. 1985), *cert. denied*, 476 U.S. 1174 (1986)] was incorrectly decided insofar as it selected Ohio's one-year statute of limitations rather than the two-year statute, such a decision would not benefit the plaintiffs. The plaintiffs waited until nearly four years after their alleged §1983 cause of action accrued before filing their complaint. As the *Mulligan* court points out, Ohio's catch-all four-year statute of limitations, Ohio Rev. Code §2305.09(D), does not apply to §1983 actions. 777 F.2d at 343 n.4.

A. at 5.[3]

---

[3] While disapproving the application of state statutes of limitation governing intentional torts, *Owens* also reaffirmed *Wilson's* rejection of "catch-all" statutes of limitation as applicable to §1983 claims. 57 U.S.L.W. at 4609, n. 11. *Owens* instructs courts to apply the personal injury statute which "either explicitly or by judicial construction" applies to unspecified personal injury claims. *Id.* Ohio's highest court recently held that Ohio Rev. Code §2305.10 (two-year period for any "action for bodily injury or injury to personal property"), applies to unspecified personal injury actions. *Hunter v. Shenango Furnace Co.*, 38 Ohio St. 3d 235, 527 N.E.2d 871 (1988) (general two-year statute, rather than one-year statute for specified intentional torts, applied to intentional tort of employer that did not "clearly indicate a battery or any other enumerated intentional tort in the Revised Code. . . ." (Syllabus)). A remand in this case would be a vain act because: 1) the only statute under which Smith's claim could be timely is Ohio's four-year "catch-all" statute for certain actions (Ohio Rev. Code §2305.09(D) [R. 3]), and 2) that statute is not applicable under this Court's holding in *Wilson*, as interpreted by the Sixth Circuit in *Mulligan* and reaffirmed in *Owens*.

B. The Court of Appeals correctly held that the *Noerr-Pennington* Doctrine barred petitioners' claims of antitrust violations arising out of respondents' providing information to the Cuyahoga County Prosecutor regarding the theft of respondents' proprietary engineering drawings, in light of petitioners' consequent prosecution, indictment and guilty pleas to receiving stolen property and converting trade secrets.

Petitioners argue that *Noerr-Pennington* immunity should not include a party's resort to the courts. Pet. at 17-18. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. _____, 108 S.Ct. 1931 (1988), cited by petitioners, holds that the standard-setting process of a private association was *not* a "governmental" action, and re-affirms that " '[W]here a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action,' those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint." 108 S.Ct. 1936 *quoting, Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1967). Petitioners also cite *Patrick v. Burget*, 486 U.S. _____, 108 S.Ct. 1658 (1988), where this Court held that physicians' activities on peer review committees did not constitute "state action" subject to *Parker v. Brown* immunity.

Neither of these cases suggests the need for review in this case. Respondents invoked governmental enforcement of criminal statutes. As stated by the District Court below, "the actions of the related defendants here are precisely those which fall under the *Noerr-Pennington* doctrine." [A. 29].

The Sixth Circuit further correctly held that under the allegations of petitioners' own complaint, the prosecution could not be construed as " 'a pattern of baseless, repetitive claims' or 'abuse of processes' necessary to constitute sham activity . . . or . . . create an inference of such." *Potters Medical Center v. City Hosp. Ass'n*, 800 F.2d 568, 579 (6th Cir. 1986), *quoting, California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972).

After learning that an unknown supplier was selling replacement parts which could be made only with respondents' proprietary drawings, respondents hired an investigator, who located "C-E Cast Equipment documents . . . [i]ncluding over seventy detailed drawings" along with checks signed by former employee Lester W. Smith in the possession of a company manufacturing the replacement parts [Complt., ¶25, A. 114]. This information was turned over to the Cuyahoga County Prosecutor [*Id.*, ¶28, A. 114]. Pursuant to a court-ordered search warrant [*Id.*, ¶30, A. 115], a search was conducted by the Sheriff's Department of Summit County [*Id.*, ¶39-40, A. 117]. A four-count indictment was issued by the grand jury of Cuyahoga County [*Id.*, ¶70, A. 124], and Lester Smith and his company, Western Reserve Group, Inc., pled guilty to receiving stolen property and criminal conversion of trade secrets [*Id.*, ¶73, A. 125-26].

The very concern which led to respondents' investigation—theft of C-E Cast's trade secrets—was vindicated in the guilty pleas. The prosecution by governmental officials, initiated after an independent evaluation of the evidence by a county prosecutor and a search conducted under the authority of a warrant issued by a court, cannot, under any interpretation of petitioners' allegations, rise to a pattern of baseless claims or sham sufficient to overcome the strong constitutional rights which give rise to *Noerr-Pennington* immunity.

C. Petitioners' collateral issues raise no question of import.

At pages 25-26, petitioners apparently take issue with the Sixth Circuit's affirmation of the trial court's holding that petitioners did not allege a continuing violation which would toll the §1983 statute of limitations. As the District Court explained:

> The conduct that forms the basis of the §1983 claim was a discreet [sic] incident that occurred on December 8, 1981—the search and seizure of the plaintiffs' property. The effects of that isolated incident do not constitute a continuing violation for the purposes of tolling the running of the statute of limitations.

[A. 25]. The courts below properly applied this Court's precedent and petitioners do not indicate any argument or authority to the contrary.

Finally, the issues sought to be raised by petitioners at pages 26 and 27 of their petition relate to an order issued by the trial court after petitioners had already appealed to the Sixth Circuit. The Sixth Circuit dismissed the appeal, holding that the underlying order was entered without jurisdiction [A. 49-52]. Those issues are therefore not before this Court.

CONCLUSION

Respondents were the victim of petitioners' confessed crimes. To argue that their cooperation in the prosecution of the criminals is a sham, not based on any genuine desire for judicial relief, or a violation of civil rights, is a perversion of our criminal system.

Nothing in the unpublished opinion issued by the Sixth Circuit merits this Court's review.

Respectfully submitted,

WALTER A. BATES, *Counsel of Record*
IRENE C. KEYSE-WALKER
GREGORY V. MERSOL
ARTER & HADDEN

1100 Huntington Building
Cleveland, Ohio 44115
(216) 696-1100

Counsel for Respondents Combustion Engineering, Inc., C-E Cast Equipment, James F. Calvert, George E. Fisher, Jr., Edwin M. Kavanagh, James B. Kelly, James E. Klima, Thomas E. McGranahan, William Francis Roche, and Arthur J. Santry, Jr.

APPENDIX

Ohio Rev. Code §1333.51. Conversion of trade secrets; prohibition; definitions.

(A) As used in this section:

(1) "Article" means any object, material, device, or substance, or copy thereof, including any writing, record, recording, drawing, sample, specimen, prototype, model, photograph, blueprint or map.

(2) "Representing" means describing, depicting, containing, constituting, reflecting, or recording.

(3) "Trade secret" means the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, or improvement, or any business claims, financial information, or listing of names, addresses, or telephone numbers, which has not been published or disseminated, or otherwise become a matter of general public knowledge. Such scientific or technical information, design, process, procedure, formula, or improvement, or any business plans, financial information, or listing of names, addresses, or telephone numbers is presumed to be secret when the owner thereof takes measures designed to prevent it, in the ordinary course of business, from being available to persons other than those selected by the owner to have access thereto for limited purposes.

(4) "Copy" means facsimile, replica, photograph, or reproduction of an article, or any note, drawing, or sketch made of or from an article.

(B) No person shall, with intent to deprive or withhold from the owner thereof the control of a trade secret, or with intent to convert a trade secret to his own use or the use of another, obtain possession of or access to an article representing a trade secret.

(C) No person, having obtained possession of an article representing a trade secret or access thereto with the owner's consent, shall convert such article to his own use or that of another person, or thereafter without the owner's consent make or cause to be made a copy of such article, or exhibit such article or another.

(D) No person shall, by force, violence, threat, bribe, reward, or offer of anything of value on or to another person or member of his family, obtain or attempt to obtain from such other person an article representing a trade secret.

(E) No person shall, without authorization, enter upon the premises of another with intent to obtain possession of or access to an article representing a trade secret.

Ohio Rev. Code §2305.09. Four years; certain torts.

An action for any of the following causes shall be brought within four years after the cause thereof accrued:

(A) For trespassing upon real property;

(B) For the recovery of personal property, or for taking or detaining it;

(C) For relief on the ground of fraud;

(D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, inclusive, 2305.14 and 1304.29 of the Revised Code.

If the action is for trespassing under ground or injury to mines, or for the wrongful taking of personal property, the causes thereof shall not accrue until the wrongdoer is discovered; nor, if it is for fraud, until the fraud is discovered.

Ohio Rev. Code §2305.10. Bodily injury or injury to personal property; when certain causes of action arise.

An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose.

For purposes of this section, a cause of action for bodily injury caused by exposure to asbestos or to chromium in any of its chemical forms arises upon the date on which the plaintiff is informed by competent medical authority that he has been injured by such exposure, or upon the date on which, by the exercise of reasonable diligence, he should have become aware that he had been injured by the exposure, whichever date occurs first.

For purposes of this section, a cause of action for bodily injury incurred by a veteran through exposure to chemical defoliants or herbicides or other causative agents, including agent orange, arises upon the date on which the plaintiff is informed by competent medical authority that he has been injured by such exposure.

As used in this section, "agent orange," "causative agent," and "veteran" have the same meanings as in section 5903.21 of the Revised Code.

For purposes of this section, a cause of action for bodily injury which may be caused by exposure to diethylstilbestrol or other nonsteroidal synthetic estrogens, including exposure before birth, arises upon the date on which the plaintiff learns from a licensed physician that he has an injury which may be related to such exposure, or upon the date on which by the exercise of reasonable diligence he should have become aware that he has an injury which may be related to such exposure, whichever date occurs first.

Ohio Rev. Code §2305.11(A). Time limitations for bringing certain actions.

(A) An action for libel, slander, malicious prosecution, false imprisonment, or malpractice, including an action for malpractice against a physician, podiatrist, hospital, or dentist, or upon a statute for a penalty or forfeiture, shall be brought within one year after the cause thereof accrued, provided that an action by an employee for the payment of unpaid minimum wages, unpaid overtime compensation, or liquidated damages by reason of the nonpayment of minimum wages or overtime compensation, shall be brought within two years after the cause thereof accrued.

If a written notice, prior to the expiration of time contained in this division, is given to any person in a medical claim that an individual is presently considering bringing an action against that person relating to professional services provided to that individual, then an action by that individual against that person may be commenced at any time within one hundred eighty days after that notice is given.

Ohio Rev. Code §2913.32. Criminal simulation.

(A) No person, with purpose to defraud, or knowing that he is facilitating a fraud, shall do any of the following:

(1) Make or alter any object so that it appears to have value because of antiquity, rarity, curiosity, source, or authorship, which it does not in fact possess;

(2) Practice deception in making, retouching, editing, or reproducing any photograph, movie film, video tape, phonograph record, or recording tape;

(3) Utter, or possess with purpose to utter, any object which he knows to have been simulated as provided in division (A)(1) or (2) of this section.

(B) Whoever violates this section is guilty of criminal simulation, a felony of the fourth degree.

Ohio Rev. Code §2913.51. Receiving stolen property (1982 version).

(A) No person shall receive, retain, or dispose of property of another, knowing or having reasonable cause to believe that the property has been obtained through commission of a theft offense.

(B) Whoever violates this section is guilty of receiving stolen property, a misdemeanor of the first degree. If the value of the property involved is one hundred fifty dollars or more ... receiving stolen property is a felony of the fourth degree. ...

Ohio Rev. Code §2923.24. Possessing criminal tools.

(A) No person shall possess or have under his control any substance, device, instrument, or article, with purpose to use it criminally.

(B) Each of the following constitutes prima-facie evidence of criminal purpose:

(1) ***

(2) Possession or control of any substance, device, instrument, or article designed or specially adapted for criminal use;

(3) Possession or control of any substance, device, instrument, or article commonly used for criminal purposes, under circumstances indicating such item is intended for criminal use.

(C) Whoever violates this section is guilty of possessing criminal tools, a felony of the fourth degree.

(4)

FILED
FEB 4 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1134

IN THE

Supreme Court of the United States

October Term, 1988

LESTER W. SMITH and WESTERN RESERVE GROUP, INC.,
Petitioners,

vs.

COMBUSTION ENGINEERING, INC., C-E CAST EQUIPMENT, JAMES F. CALVERT, GEORGE E. FISHER, JR., LAWRENCE K. HUBBELL, EDWIN M. KAVANAGH, JAMES B. KELLY, JAMES E. KLIMA, THOMAS E. McGRANAHAN, WILLIAM FRANCIS ROCHE, ARTHUR F. SANTRY, JR., and FG DOE, EN ROE and JB LOE,
Respondents.

RULE 22.6 SUPPLEMENTAL BRIEF FOR PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MACK D. COOK, II, *Counsel of Record*
COOK & COOK
900 First National Tower
Akron, Ohio 44308
Telephone (216) 376-1005
Attorney for Petitioners Lester W. Smith and Western Reserve Group, Inc.

REBECCA H. COOK
Of Counsel

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

15 pp

TABLE OF CONTENTS

Two Recent Decisions of This Court Are Applicable to the Decision of the Court of Appeals 1

Two Earlier but Still Recent Decisions of this Court Continue to Be Applicable to the Decision of the Court of Appeals 4

Recent Decision from First Circuit Applying this Court's Decision in *Anderson v. Creighton*..... 6

Conclusion 8

APPENDIX (Filed under separate cover, January 7, 1989):

Decision by a Panel of the Sixth Circuit Court of Appeals, Appeals Nos. 87-3378 and 87-3657, Affirming the Judgment of the District Court (August 24, 1988) A1, A3-A5

* * * * *

District Court Memorandum Opinion (February 19, 1986) ..... A11, at A15-A18

District Court Judgment Entry (February 19, 1986) A22

District Court Order (July 29, 1986) A23-A25

District Court Memorandum Opinion (January 21, 1987) A26-A30

District Court Judgment Entry (January 21, 1987) A31

District Court Memorandum Opinion (March 24, 1987) A32-A33

District Court Judgment Entry (March 24, 1987) .. A34

District Court Order (March 24, 1987) A35-A37

District Court Order (March 24, 1987) A38

District Court Memorandum Opinion (June 10, 1987) A39-A41

District Court Judgment Entry (June 10, 1987) ... A42

District Court Order (July 24, 1987) A43-A45

* * * * *

Petitioners' Statement of Issues Presented for Review, Court of Appeals for the Sixth Circuit, Appeal No. 87-3378 ..... A57

Petitioners' Statement of Issues Presented for Review, Court of Appeals for the Sixth Circuit, Appeal No. 87-3657 ..... A58

* * * * *

Petitioners' Submission to the Court of Appeals for the Sixth Circuit for Reconsideration and Rehearing *En Banc* of Appeals Nos. 87-3378 and 87-3657 ..... A62-A63, A67-A71

* * * * *

Letter for Petitioners, Dated July 1, 1988, List of Citations Updating the Briefs of Appellants for Appeals Nos. 87-3378 and 87-3657 . A80, at A85-A89

* * * * *

Petitioners' Complaint Filed November 18, 1985 in District Court A108

Petitioners' Amended Complaint Filed July 22, 1985 ..... A130

* * * * *

Ohio Rev. Code. §2305.09 ..... A135

* * * * *

42 U.S.C. §1983 ..... A136

* * * * *

Prosser, the Law of Torts, Fourth Edition, West Publishing Co. (1971) Chapter 22, 121, pp. 121-122 (Abuse of Process) A141-A142

Title 15 U.S.C. §1 ..... A142

Title 15 U.S.C. §2 ..... A142

* * * * *

Antitrust Remedies for a Former Employee Sued for Trade Secret Misappropriation, ABA, Section of Litigation, unpublished paper 531-0023/4T, © 1988. . . . . A145-A155

Affidavit of Lester W. Smith (January 28, 1986) A156-A157

Affidavit of Lester W. Smith (December 10, 1986) A158-A161

Letter, Edward Niam to James B. Kelly, January 27, 1984 . . . . . A162-A163

Letter, Edward Niam to William F. Roche, February 3, 1984 . . . . . A164-A165

Letter, Edward Niam to Peter Phipps, January 30, 1984 . . . . . A166

Letter, Edward Niam to Tom Beres, February 1, 1984. . . . . A167

Letter, Edward Niam to Richard Lobo, February 1, 1984. . . . . A168-A169

Letter, Edward Niam to Assistant Prosecutor Gasper, January 30, 1984 . . . . . A170

Letter, Edwin M. Kavanagh to Edward Niam, January 16, 1984 . . . . . A171

Letter, Edward Niam to Edwin Kavanagh, February 1, 1984 . . . . . A172-A173

Letter, Lawrence K. Hubbell to Donald L. Southam, January 29, 1986 . . . . . A174-A175

* * * * *

TABLE OF AUTHORITIES

Cases

Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. _____, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988) 4

Anderson v. Creighton, 483 U.S. _____, 107 S. Ct. 3034, 97 L. Ed. 523 (1987) 6

Aronson v. Quick Point Pencil Company, 440 U.S. 257 (1979) 4

Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974) 4

Mulligan v. Hazard, 777 F.2d 340 (CA6 1985) 1,2,3

Owens v. Okure, _____ U.S. _____ (1989), No. 87-56, 57 L.W. 4065 1,3

Patrick v. Burget, 486 U.S. _____, 108 S. Ct. 1658, 100 L. Ed. 2d 83 (1988) 4

Thomas v. Shipka, _____ U.S. _____ (1989), No. 87-1384, 57 L.W. 3486 2

Unwin v. Campbell, 863 F.2d 124 (CA1 1988) (44 Cr1 2240) 6,7

Vodila v. Clelland, 836 F.2d 231 (CA6 1987) 3

Vodila v. Clelland (No. 86-700), _____ U.S. _____, 107 S.Ct. 3255, 97 L. Ed 754 (1987) 3

Wilson v. Garcia, 471 U.S. 261 (1985) 1,2

Statutes

Ohio Rev. Code §1333.51(C) 4

Ohio Rev. Code §1333.99(E) 4

No. 88-1134

IN THE

Supreme Court of the United States

October Term, 1988

LESTER W. SMITH and WESTERN RESERVE GROUP, INC.,
Petitioners,

vs.

COMBUSTION ENGINEERING, INC., C-E CAST EQUIPMENT, JAMES F. CALVERT, GEORGE E. FISHER, JR., LAWRENCE K. HUBBELL, EDWIN M. KAVANAGH, JAMES B. KELLY, JAMES E. KLIMA, THOMAS E. McGRANAHAN, WILLIAM FRANCIS ROCHE, ARTHUR F. SANTRY, JR., and FG DOE, EN ROE and JB LOE,
Respondents.

RULE 22.6 SUPPLEMENTAL BRIEF FOR PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TWO RECENT DECISIONS OF THIS COURT ARE APPLICABLE TO THE DECISION OF THE COURT OF APPEALS

Part II of the judgment of a panel of the Sixth Circuit, filed August 24, 1988 (Pet. App. A3-A5), which affirmed all judgments of the District Court which were appealed, speaks to the question of a one-year time bar retroactively applied against the First Count of petitioners' Complaint in a district court against all respondents.

In excerpt, the Court of Appeals for this case has said:

* * * * *

II

> The district court granted the defendants' motion to dismiss the civil rights claim, brought pursuant to §1983, on the basis of limitations***.
>
> Applying *Wilson v. Garcia*, 471 U.S. 261 (1985), and *Mulligan v. Hazard*, 777 F.2d 340 (6th Cir. 1985), *cert. denied*, 476 U.S. 1174 (1986), the district court held that the civil rights action was time barred***.
>
> * * * * *
>
> ***As the *Mulligan* court pointed out, Ohio's catch-all four-year statute of limitations, Ohio Rev. Code §2305.09(D)[1], does not apply to §1983 actions. 777 F.2d at 343 n.4.

The petition for No. 88-1134 was filed January 7, 1989.

The full and unanimous decision of this Court in *Owens v. Okure*, _____ U.S. _____ (1989), No. 87-56, 57 L.W. 4065, was announced January 10, 1989.

---

[1] Please see Pet. App. A135 for O.R.C. §2305.09(A), (B) and (D).

The grant of certiorari—summary disposition order of this Court in *Thomas v. Shipka*, _____ U.S. _____ (1989), No. 87-1384, 57 L.W. 3486, was handed down January 23, 1989.

The combined result of these two decisions was an immediate mandate for the Sixth Circuit Court of Appeals (and all federal district courts in the State of Ohio) to no longer automatically apply, retroactively or otherwise, the one-year time bar *Rule* judicially created by the Court of Appeals in *Mulligan v. Hazard*, 777 F.2d 340 (CA6 1985).

In November of 1985, petitioners sought to invoke the four-year statute of limitations provided by Ohio law[2]: "[W]hich applies to certain torts including trespass, theft, fraud and any other torts not otherwise provided for by other sections[8]", *Thomas v. Shipka* (II) 829 F.2d 570, at 574 (CA6 1987).

Although the judgment of Sixth Circuit in *Thomas v. Shipka* (II), *supra*, has just been vacated by summary action, the quotation from that decision in the paragraph next above confirms that at least a few of the circuit judges knew about the four-year time bar of Ohio Revised Code §2305.09. After *Wilson v. Garcia*, at least a majority of the circuit judges appeared as comfortable with the "docket clearing" one-year time bar of another Ohio Revised Code Section.[3] Now, since January 23,

[2] Complaint ¶2. "This action is timely filed by virtue of Title 15 U.S.C. §15b and Ohio Revised Code §2305.09 (four year statutes of limitation)." Pet. App. A109.

[3] If the Court should determine to grant certiorari in No. 88-1134 and accept petitioners' case for full hearing and oral argument, signatory counsel would attempt to provide the court with a survey of Sixth Circuit/Ohio district court §1983 cases with prima facie merit claims forever lost because of *Mulligan v. Hazard*. One immediate example is

(Footnote continued on following page.)

1989, all of the circuit judges have been mandated by this Court to select and apply "a residual statute for all other personal injury actions", *Owens v. Okure, supra*, _____ U.S. at _____, 57 L.W. at 4066.

Choosing a balance point between Court time available for argument and full opinion and fair and equitable summary disposition for the Petition question of a one-year time bar retroactively applied against the First Count of petitioners' Complaint, petitioners should and do now pray for a vacation of Part II of the Sixth Circuit judgment of August 24, 1988, with instructions to remand to a district court for plenary trial on the merits of each of petitioners' multiple claims in the First Count of the Complaint for this case.

(Footnote continued from preceding page.)

Vodila v. Clelland, 836 F.2d 231 (CA6 1987), where on December 28, 1987, plaintiff's case was denied plenary trial on the merits despite the action taken by this Court June 26, 1987 in *Vodila v. Clelland* (No. 86-700), _____ U.S. _____, 107 S.Ct. 3255, 97 L.Ed. 754 (1987). Signatory counsel also comments that a survey of Sixth Circuit/Ohio district court cases after *Mulligan v. Hazard* will not be complete because of the "Not Recommended For Full-Text Publication" procedures of the Sixth Circuit. Regrettably, it is apparent to signatory counsel that many Ohio district court cases involving *Mulligan v. Hazard* have also not been published.

TWO EARLIER BUT STILL RECENT DECISIONS OF THIS COURT CONTINUE TO BE APPLICABLE TO THE DECISION OF THE COURT OF APPEALS

The facts of petitioners' case against respondents bring forth the common law based issues of "trade secret" and "abuse of process" for review in light of *Patrick v. Burget*, 486 U.S. _____, 108 S.Ct. 1658, 100 L.Ed. 2d 83 (1988) and, *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. _____, 108 S.Ct. 1931, 100 L.Ed. 2d 497 (1988). Determination of these two common law issues is necessary to answer the second broad question initially presented for review: [I]s conspiratorial anticompetitive and monopolistic conduct shielded from federal antitrust law review by the *Noerr-Pennington* doctrine? (Pet. p. I)

As a matter of competitive edge, many businesses now elect to protect commercially valuable information through reliance upon a state law of *trade secret* protection. *Kewanee Oil Co. v. Bicron Corp.*[4], 416 U.S. 470 (1974), which establishes that neither the Patent Clause of the United States Constitution nor the federal patent laws pre-empt state *trade secret* protection for patentable or unpatentable information, may well have increased the extent of this reliance.

The decision of the Court in *Aronson v. Quick Point Pencil Company*, 440 U.S. 257 (1979), reaffirmed *Kewanee Oil, supra*, and further held that federal patent law is not a barrier to a contract by which someone agrees to pay a continuing royalty in exchange for the disclosure of a *trade secret* concerning a product.

[4] *Kewanee Oil* reached this Court from federal courts in the Sixth Circuit and involved both Ohio case law on definition of "trade secret" and the same Ohio statutes (Ohio R.C. 1333.51(C) and 1333.99(E)), chosen by the Combustion Engineering respondents, and/or the private investigator Niam and the Cleveland law firm Arter & Hadden, to spearhead the criminal prosecution phase conducted by County Prosecutor FG Doe intended to wipe out or totally destroy the petitioners as relevant market competition.

For petitioners' case against respondents, it has been determined as "true facts", by investigation and by discovery deposition and by unchallenged assertion to the courts below, that Combustion Engineering, the "established firm", is *without patents, trademarks, copyrights or bonafide trade secrets to support a civil action in federal or state court.*

As petitioners have just said to this Court over the signature of their counsel of record, Pet. p. 23, in repetition of what was said to the Court of Appeals below,—*When the state grand jury indicted, there were mere allegations of several crimes which can be shown at a plenary trial on the merits as having been capable of no reasonable proof. At trial, a false assertion by the Combustion Engineering defendants of trade secrets will be shown as yet another form of antitrust violation*—: Pet. App. A74.

The interface of the petition for No. 88-1134, with the second common law evidentiary issue, *abuse of process,* has been presented as Question 2, Pet. p. I, and preliminarily briefed, Pet. pp. 18-20, under the argument caption—

> The Courts Below Were Wrong In Refusing To See That The Tort Of "Abuse Of Process", Not "Malicious Prosecution", Was The Appropriate Objective Test For Evaluating Respondents' Conduct In Resorting To State Court Prosecution Until Petitioners Pled Guilty.

Resolution of the state law evidentiary issues of *trade secret* and *abuse of process* for answer to the federal law question of expanded *Noerr-Pennington* immunity should and does now require vacation of Part III of the Sixth Circuit judgment of August 24, 1988 (Pet. App. A5-A8), with instructions, including remand to a district court for plenary trial on the merits of all claims in the Second and Third Counts of the Complaint for this case.

RECENT DECISION FROM FIRST CIRCUIT APPLYING THIS COURT'S DECISION IN *ANDERSON v. CREIGHTON*

The decision of this Court in *Anderson v. Creighton*, 483 U.S. _____, 107 S.Ct. 3034, 97 L.Ed. 523 (1987) has not been cited to the Sixth Circuit by petitioners. This decision has become relevant to petitioners' case before this Court in light of a very recent decision of the United States Court of Appeals for the First Circuit: *Unwin v. Campbell*, 863 F.2d 124 (CA1 1988) (44 Cr1 2240).

Unwin v. Campbell appears to stand for a proposition of federal law that an appeals court must consider undisputed facts revealed during discovery when reviewing a defendant's claim for entitlement to an immunity defense.

Unwin was dealing specifically with defendants who were state and local police officers claiming immunity from damages in a prison inmate's action against them under 42 U.S.C. 1983. An interlocutory appeal had been granted from the district court's denial of defendants' motions for summary judgment on grounds of qualified immunity. Relevant to the petition for No. 88-1134, the *Unwin* general proposition that an appeals court must consider undisputed facts revealed during discovery when reviewing a defendant's claim for entitlement to an immunity defense appears to be applicable.

The Sixth Circuit judgment of August 24, 1988 (Pet. App. A1-A8) makes no reference to any matters outside the pleadings which could have lead to reversal of any of the multiple opinions, judgments and orders of the district court which were appealed.

The Joint Appendix to Sixth Circuit for Appeals No. 86-3378 and No. 86-3657 (and No. 87-3761) included two "smoking gun" letters obtained by petitioners' discovery from the office files of Niam Investigations and addressed to respondents Kelly and Roche. For these two letters, and six other letters exchanged between conspirators during days in 1984 following the misdemeanor conviction of petitioner Smith produced by state court prosecution under state trade secret felony theft law, see Pet. App. A162-A173. The discovery also included a letter originated by respondent Hubbell and sent to a management person of respondent C-E Cast Equipment requesting a payment of legal fees for defending against petitioners' claims in the Complaint: Pet. App. A174-A175. At oral argument, the Sixth Circuit was shown discovered Exhibit 12 (as described in detail by Pet. p. 12 and n. 13).

In preparing the petition for No. 88-1134, there was clear Sixth Circuit precedent for the argument, Pet. pp. 21-22, under the caption—

> The Courts Below Were Wrong In Not Expecting Or Requiring Testimonial Or Affidavit Evidence From Respondents Or Their Attorneys That Any Or All Of Them Were Acting In "Good Faith" When Seeking Out The Participation Of A State Prosecutor Or The Prosecutor's Office For Further Actions Of Anticompetitive Conduct Creating Monopoly Power.

However, until *Unwin v. Campbell*, there was no clear precedent from any court of appeals for arguing to this Court that the courts below were wrong in not evaluating the evidentiary weight of petitioners' discovery documents when reviewing the right of all respondents to the shield from federal antitrust law review with the escutcheon of the *Noerr-Pennington* doctrine.

CONCLUSION

If the Court should determine by grant of certiorari—summary disposition order to vacate the judgment of the Court of Appeals filed August 24, 1988 in its entirety, and to remand with instructions as to petitioners' Second and Third Counts, including remand to a district court for plenary trial on the merits of each of petitioners' claims in all Counts, the Court may further determine that oral argument and immediate review is not required until after a district court trial and jury verdict on the state law and common law evidentiary issues of "trade secret" and "abuse of process" (and also "trespass to land", and "trespass to chattels" or "conversion").

Also, the Court would not need to now review and decide the important considerations presented for review including any conflict with the decisions of other federal courts of appeals on the same matters, or which could call for an exercise of this Court's power of supervision.

The Court need only decide that the Sixth Circuit Court of Appeals has decided important questions of federal law in a way in conflict with applicable decisions of this Court.

Respectfully submitted,

MACK D. COOK, II, *Counsel of Record*
900 First National Tower
Akron, Ohio 44308-1418
(216) 376-1005
Attorney for Petitioners
Lester W. Smith and
Western Reserve Group, Inc.

Of Counsel
COOK & COOK
REBECCA H. COOK